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Chapter 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Bilateral Open Skies and Air Transport Agreements

Information on recent U.S. Open Skies and other air transport agreements, by country, is available at www.state.gov/e/eb/rls/othr/ata/index.htm. During 2011, activities on Open Skies included the following:

- On March 19, the United States and Brazil signed a new air transport agreement which, upon entry into force, will establish a bilateral Open Skies air transportation relationship between the two countries (agreement available at www.state.gov/e/eb/rls/othr/ata/b/br/159222.htm);
- On April 18, the United States and the Kingdom of Saudi Arabia initialed the U.S.-Saudi Arabia Open Skies Agreement, which will be applied on the basis of comity and reciprocity pending its entry into force (memorandum of consultations available at www.state.gov/e/eb/rls/othr/ata/s/sa/161210.htm);
- On May 10, the United States and Colombia signed a new air transport agreement which, upon entry into force, will establish a bilateral Open Skies air transportation relationship between the two countries (agreement available at www.state.gov/e/eb/rls/othr/ata/c/co/151202.htm);
- On June 21, the United States, of the first part, the 27 EU Member States and the European Union, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part, signed an agreement to apply the Air Transport Agreement signed by the United States and the European Community and its Member States on April 25 and 30, 2007, as amended, to Iceland and Norway; this agreement will enter into force upon an exchange of diplomatic notes among the Parties confirming that all necessary procedures for entry into force of the agreement have been completed; the agreement is available at www.state.gov/e/eb/rls/othr/ata/i/ic/170684.htm;
- On July 11, the United States and the Republic of Macedonia initialed the U.S.-Macedonia Open Skies air transport agreement, which will be applied on the basis of comity and reciprocity pending its entry into force (memorandum of consultations and agreement available at www.state.gov/e/eb/rls/othr/ata/m/mk/168779.htm);
- On December 13, the United States and St. Christopher and Nevis signed the U.S.-St. Christopher and Nevis Open Skies air transport agreement, which entered into force upon signature and is available at www.state.gov/e/eb/rls/othr/ata/s/sc/182341.htm.

Also in 2011, the United States marked a milestone of having negotiated Open Skies agreements with over 100 partners. Secretary of State Hillary Rodham Clinton's remarks on the occasion are excerpted below and are available in full at

www.state.gov/secretary/rm/2011/03/159389.htm.

* * * *

...[I]t's a real pleasure for me to welcome you ... as we celebrate the negotiation of agreements between the United States and 100 Open Skies partners. ...

...I want to extend a special greeting to Colombian Ambassador Gabriel Silva, whose country became our 100th partner last November. So thank you so much.

...[W]e know what the benefits are of these Open Skies agreements. They not only allow us to cross great distances, which I have been doing a lot of recently, but also to open up markets, create jobs, allow people in far-removed countries to interact, share information, and build businesses together.

For too long, however, restrictive agreements between governments cut off all of these potential connections. They kept airlines from entering certain markets. They forced shipping companies to fly inefficient routes with half-empty airplanes. And, by stifling competition, they kept air fares artificially high.

That's why the Department of State and Department of Transportation negotiated the first Open Skies Agreement, with the Netherlands, in 1992. Now, today, we have agreements with countries in every region of the world, from major economies, such as Japan, Canada and the European Union, to smaller but equally important countries such as El Salvador and Senegal. And on the President's recent trip to Latin America, we concluded our new agreement with Brazil, our 101st partner. And we look forward to expanding these partnerships around the world.

In each case, an Open Skies agreement has powerful benefits—fewer government restrictions, more competition, more jobs in the air and on the ground; more people trading, exchanging and interacting; cheaper flights, more tourists, new routes to new cities—so that we now have passengers and shippers enjoying direct services between cities like Las Vegas and Seoul, or Phoenix and Montreal.

Just consider for a minute what this agreement with one country, Colombia, will mean. Now, one of Colombia's biggest exports—fresh-cut flowers—will make it to the flower stands of the United States even faster because shippers will now have more direct access to more American cities. And on the U.S. side, our computers, sensitive electronics, and spare parts for all types of equipment will make it to Colombia more quickly and efficiently. And with more direct services between more points, we'll see more recreational and business travel between our two countries.

* * * *

2. European Union's Emissions Trading Scheme

In 2011, the United States joined multilateral efforts to prevent the European Union ("EU") from including in the EU Emissions Trading Scheme ("ETS") all international air carriers flying into or out of Europe. On September 30, 2011, more than 20 countries, including the U.S., issued a joint declaration opposing the inclusion of international aviation in the EU ETS and urging the EU to work on a global solution at the International Civil Aviation Organization ("ICAO"). The September 30 joint declaration, known as the Delhi Declaration, was later adopted by the 36 member ICAO Council, over the objection of eight EU Member States, on November 2, 2011 at the Second Meeting of the 194th Session of the ICAO Council. ICAO Doc. C-DEC 194/2. The November 2 Declaration adopted by the ICAO Council is set forth below and is available at www.ainalerts.com/ainalerts/alertimages/ICAO.pdf.

* * * *

Recognizing the essential role aviation plays in economic progress and market access for the world economy and its citizens;

Recognizing the importance of sustainable development;

Recalling the relevant provisions of the *United Nations Framework Convention on Climate Change (UNFCCC)*;

Stressing the importance of the Kyoto Protocol to its Parties;

Recalling [the] importance of the Chicago Convention and need for ensuring full compliance with its provisions;

Affirming the importance of the role [of] the International Civil Aviation Organization (ICAO) in addressing aviation emissions, including pursuant to the request from the Parties to the UNFCCC;

Recognizing that international aviation's growth makes it necessary to address the long-term growth of Greenhouse Gas (GHG) emissions that contribute to global climate change;

Noting that the overall increase in civil aircraft fuel efficiency of approximately 70 percent over the last 40 years has significantly reduced aviation greenhouse gas emissions;

Stressing that complementary national, regional, and global endeavours developed on the basis of collaboration and mutual agreement will enhance our capacity to address aviation emissions effectively;

Determining that emphasis should be placed on measures that will reduce aviation emissions while at the same time avoiding adverse impacts on air transport;

Desiring to provide strong leadership and to build upon the significant steps and the positive foundation established by the international community through ICAO's efforts;

The Council:

1. *Calls on ICAO* to continue to undertake efforts to reduce aviation's contribution to climate change;

2. *Intends to collaborate* in support of operational changes and improvements to air traffic management and airport systems, which will tend to reduce emissions of the aviation sector;

3. *Intends to accelerate* the development and implementation of low-carbon aircraft technologies and sustainable alternative fuels, and sharing of best practice;

4. *Supports ICAO efforts* to develop a meaningful aircraft CO₂ standard aiming for 2013;
5. *Opposes* the EU's plan to include all flights by non-EU carriers to/from an airport in the territory of an EU Member State in its emissions trading system (EU Directive 2008/101/EC), which is inconsistent with applicable international law;
6. *Urges* the EU and its Member States to refrain from including flights by non-EU carriers to/ from an airport in the territory of an EU Member State in its emissions trading system;
7. *Urges* the EU and its Member States to work collaboratively with the rest of the international community to address aviation emissions;
8. *Intends to continue* to work together to oppose the imposition of the EU ETS.

* * * *

B. NORTH AMERICAN FREE TRADE AGREEMENT

1. Investment Dispute Settlement under Chapter 11

a. *Final Award: Grand River Enterprises Six Nations, Ltd. v. United States of America*

On January 12, 2011, a NAFTA Chapter 11 tribunal rejected all remaining claims against the United States brought by Grand River Enterprises Six Nations, Ltd., a Canadian corporation, and Jerry Montour, Kenneth Hill and Arthur Montour Jr., members of Canadian First Nations. *Grand River Enterprises Six Nations, Ltd. v. United States of America*. Claimants submitted their claims in 2004, challenging certain legislative measures taken by various states related to the landmark 1998 Master Settlement Agreement ("MSA") between multiple states and major U.S. tobacco companies. In 2006, the tribunal determined that some of the claims brought against the United States were time-barred. See *Digest 2006* at 688-93. See *Digest 2008* at 528-42 for a discussion and excerpts of the United States counter-memorial filed in the case. Claimants had sought as much as \$664 million in damages. A media note issued by the State Department summarized the tribunal's conclusions in its final award on the merits:

The Tribunal held that it did not have jurisdiction over the claims of Grand River Enterprises Six Nations, Ltd., Jerry Montour and Kenneth Hill because these Claimants did not have an investment in the United States. With regard to the claims of Arthur Montour Jr., the Tribunal held that the legislative measures in question were not discriminatory, did not violate the minimum standard of treatment provision of the NAFTA, and did not constitute an expropriation of his investment.

www.state.gov/r/pa/prs/ps/2011/01/154691.htm. Excerpts below discuss each of these conclusions. (Most footnotes have been omitted.) The tribunal's award is available at www.state.gov/documents/organization/156820.pdf

* * * *

85. This case poses an unusual situation. As relevant here, Grand River's business is centered on the manufacture of cigarettes at Grand River's cigarette plant at Ohsweken in Canada and their sale and export to two distributors in the United States. The three Grand River Claimants' most obvious and substantial investment—the manufacturing plant—is in Canada. One of the distributors—Arthur Montour, the fourth Claimant in this case—clearly is an investor with an investment in the United States. The other distributor—Tobaccoville—is an independent U.S. corporation that purchases Grand River's cigarettes and distributes them off reservation under the terms of a contract with Grand River. It is a U.S. owned and controlled entity. It is not, and could not be, claimed as part of the Claimants' investment.

86. The Claimants' position regarding the investment in the cigarette plant at Ohsweken, Ontario evolved over the course of the proceedings. The Claimants' pleading described their investment as including “millions of dollars ... to purchase truly state of the art equipment” for the manufacturing plant. The Claimants initially included \$38 million (later reduced to \$24 million) in lost investment in equipment in Ohsweken in calculating their damages claim. However, at the hearing, the Claimants' valuation expert expressed reservations about the accuracy of even the reduced figure, and the Claimants withdrew their \$24 million claim for damages in respect of their plant in Canada in their closing arguments at the hearing.

87. Prior NAFTA tribunals have held, following extensive briefing and argument, that they do not have jurisdiction over claims that are based upon injury to investments located in one NAFTA Party on account of actions taken by authorities in another. Chapter Eleven would be applicable only to investors of one NAFTA Party who seek to make, are making, or have made, an investment in another NAFTA Party: absent those conditions, both the substantive protection of Section A and the remedies provided in Section B of Chapter Eleven are unavailable to an investor. Thus, the tribunal in *Canadian Cattlemen* found it lacked jurisdiction over a claimed NAFTA breach “where all of the Claimants' investments at issue are located in the Canadian portion of the North American Free Trade Area and the Claimants do not seek to make, are not making and have not made any investment in the territory of the United States of America.”

88. *Bayview Irrigation District v. United Mexican States* is similar. There, U.S. water right holders in the state of Texas alleged that water use authorized in Mexico impaired their U.S. investments. The claim was dismissed on the ground that NAFTA did not provide rights or protections “to investors whose investments are wholly confined to their own national states.” It was held in that case that a salient characteristic of an investment covered by the protection of NAFTA Chapter Eleven would be that the investment is primarily regulated by the law of a state other than the state of the investor's nationality, and that this law is created and applied by that state which is not the state of the investor's nationality.

89. The Tribunal finds the reasoning of these decisions persuasive here. The Claimants' investment in Grand River's cigarette plant in Canada does not satisfy the jurisdictional requirements of a claim under NAFTA Article 1101.

* * * *

122. The Claimants urged that in assessing whether they had an investment satisfying the requirements of NAFTA's Article 1139, the Tribunal should consider the totality of their

activities and not weigh each element in isolation. The Tribunal agrees. However, given the relatively restricted definition of “investment” under Article 1139, the Claimants must nonetheless establish an investment that falls within one or more of the categories established by that Article. Viewing the evidence of their activities in the aggregate in light of their claim for hundreds of millions of dollars, the Claimants have failed to show that Jerry Montour, Kenneth Hill and Grand River have an investment in the United States that qualifies as such within any of those categories. They have shown no investment in the United States by way of enterprise, loan, property or other interest conforming to the definition of Article 1139. Their claims, which relate to off-reservation sales of Grand River’s cigarettes, are therefore dismissed for lack of jurisdiction.

* * * *

126. ...In this section, the Tribunal addresses the claim of expropriation of Arthur Montour’s investment under NAFTA Article 1110, and the contention that the disputed measures are inconsistent with his reasonable and legitimate expectations, a contention also made to support his claim under NAFTA Article 1105.

A. The Question of the Claimant’s Reasonable Expectations

127. In his claims under both NAFTA Articles 1105 and 1110, Arthur Montour contended that the disputed measures, including the complementary legislation, were inconsistent with his reasonable investment-backed expectations. The Respondent agreed that the issue of an investor’s reasonable expectations can be relevant to a claim of regulatory expropriation under NAFTA Article 1110, but maintained that such expectations were not legally relevant to claims of denial of fair and equitable treatment under the customary law minimum standard of treatment under NAFTA Article 1105. Given this disagreement, the Tribunal addresses issues related to Arthur Montour’s reasonable expectations here, in the context of the Article 1110 claim, where both Parties recognize their potential relevance. The following discussion applies with equal weight to all of Arthur Montour’s arguments that his legitimate expectations were frustrated contrary to NAFTA’s Chapter 11.

* * * *

142. As to U.S. domestic law, given its unsettled nature in relevant respects, it is implausible to find that Mr. Montour could have reasonably expected, and reasonably relied on such an expectation as a prudent investor, that states would refrain from applying the MSA measures to him as they have done. ... U.S. states had at least a colorable argument under domestic law for valid application of the MSA measures to his activities. By this observation the Tribunal is not expressing agreement with the argument in favor of state regulation. The point is that the relative strength of this argument and the range of relevant domestic judicial precedents were such that Mr. Montour was not in a position to reasonably harbor an expectation, upon which he would be entitled to rely under NAFTA, that he would be free from application of the MSA measures. The Tribunal believes, however, that Mr. Montour did have a reasonable expectation that he could pursue his challenge to the application of the MSA measures to his activities on the basis of U.S. domestic law in U.S. domestic courts, and the Tribunal understands that he in fact has done so.

143. Similarly, the Tribunal declines to resolve the opposing interpretations of the Jay treaty in relation to Arthur Montour's commercial activities. The Tribunal affirms the importance of the principle of *pacta sunt servanda* and acknowledges the significant and constructive roles treaties may have in securing the rights of indigenous peoples. The Tribunal also acknowledges the importance of the Jay Treaty for protecting cross-border movement and trade among indigenous peoples in North America. However, Mr. Montour asserts an absolute immunity from state regulation for commercial activities involving cross-border trade at a significant scale, and in doing so relies on an interpretation of the Jay Treaty that is not plainly supported by the text or easily and readily derived from application of accepted rules of treaty interpretation. What is readily apparent, instead, are the ambiguities in the meaning of the text in respect of the far-reaching claimed immunity, especially in light of the understandings and practice of the contemporary treaty parties, Canada and the United States, which are contrary to the Claimants' interpretation and which must be taken into account. ...

144. The Tribunal also notes that trade in tobacco products has historically been the subject of close and extensive regulation by U.S. states, a circumstance that should have been known to the Claimant from his extensive past experience in the tobacco business. An investor entering an area traditionally subject to extensive regulation must do so with awareness of the regulatory situation.

145. Given the circumstances—including the unresolved questions involving the Jay Treaty and U.S. domestic law, and the practice of heavy state regulation of sales of tobacco products—the Tribunal holds that Arthur Montour could not reasonably have developed and relied on an expectation, the non-fulfillment of which would infringe NAFTA, that he could carry on a large-scale tobacco distribution business, involving the transportation of large quantities of cigarettes across state lines and into many states of the United States, without encountering state regulation. (As noted above, Native Wholesale Supply's sales on the Seneca Reservation in New York State are not at issue.)

B. Arthur Montour's Expropriation Claim

146. The Tribunal has jurisdiction over Arthur Montour's claim, including his claim that improper enforcement actions by various states other than New York affecting Native Wholesale Supply's sales have resulted in the expropriation of a substantial portion of the value of his investment. The Tribunal accordingly considers here whether the circumstances claimed involved an expropriation in violation of NAFTA Article 1110.

147. The starting point must be the language of Article 1110(1), providing that [n]o Party may directly or indirectly nationalize or expropriate *an investment* of an investor of another Party in its territory," unless certain conditions are met (emphasis added). The text speaks of "an investment," not "an investment or some portion thereof." The most natural reading of the language is that any act of expropriation will affect the totality of an investment. This is in harmony with the conception of expropriation applied in numerous cases—that expropriation involves the deprivation or impairment of all, or a very significant proportion of, an investor's interests.

148. Other NAFTA Tribunals have regularly construed Article 1110 to require a complete or very substantial deprivation of owners' rights in the totality of the investment, and have rejected expropriation claims where (as here) a claimant remained in possession of an ongoing business. ...

154. The language of Article 1110 and the reasoning of numerous tribunals show that an expropriation must involve the deprivation of all, or a very great measure, of a claimant's property interests. The Claimant pointed to no cases supporting the notion that state action allegedly impairing only a limited portion of the value of an otherwise ongoing and profitable investment like Native Wholesale Supply can give rise to a "partial" expropriation under either NAFTA Article 1110 or general international law. ...

155. The Tribunal has been offered no reason to interpret the language of NAFTA's Article 1110(1) to mean other than it says. An act of expropriation must involve "the investment of an investor," not part of an investment. This is particularly so in these circumstances, involving an investment that remains under the investor's ownership and control and apparently prospered and grew throughout the period for which the Tribunal received evidence. Arthur Montour's expropriation claim fails for failure to establish an expropriation within the scope of Article 1110.

* * * *

156. The Claimants alleged that the Respondent has violated its obligations to assure national and most-favored-nation treatment under Articles 1102 and 1103 of NAFTA....

* * * *

169. However, the record does not establish that Arthur Montour's distribution business was subjected to enforcement measures that were not applied to other similarly situated businesses, or that other similarly situated investments received better treatment. Indeed, the Tribunal understands a core element of Mr. Montour's NAFTA claims to be that he and his distribution companies should not have been subject to the disputed measures applicable to other similarly situated investors and investments, because of his situation as a First Nations trader.

* * * *

173. The Claimants—and, as relevant here, Arthur Montour—contended that their treatment by various states of the United States violated the Respondent's obligation to accord fair and equitable treatment as required by NAFTA's Article 1105....

* * * *

180. In the Claimants' view, the content of the United States' obligations under Article 1105 is further shaped by U.S. obligations under the Jay Treaty, by principles of customary international law involving indigenous peoples, and by international human rights treaties and customary principles of human rights law. At the hearing, the Claimants' counsel urged that such international legal obligations were "relevant" in determining the obligations owed to these Claimants under Article 1105. In response to the Tribunal's question, counsel urged in this regard that the minimum standard of treatment was not a standard applicable to aliens generally, but that it varied to take account the varying status and legal rights of particular claimants.

181. The Tribunal has previously addressed aspects of this line of argument. While other legal rules may shape the context in which Article 1105 is applied, they do not alter the content

of the customary international law minimum standard of treatment. This follows from the very conception of the international minimum standard, which the Tribunal must apply pursuant to the Free Trade Commission's direction. The FTC directed that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment" that must be given to covered investments. This must be read in harmony with the Commission's further instruction that "[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

* * * *

208. *The Tribunal's Conclusions.* The language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors' investments, and one cannot assert such a rule under customary international law. States discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection. ...

209. Thus, neither Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments. Further, it has not been shown that either the text of Article 1105 or the customary minimum standard includes the more specialized prohibitions and requirements involving indigenous peoples invoked here, much less that those requirements have been breached as to Arthur Montour.

210. It may well be, as the Claimants urged, that there does exist a principle of customary international law requiring governmental authorities to consult indigenous peoples on governmental policies or actions significantly affecting them. One member of the Tribunal has written that there is such a customary rule. Moreover, a recent study by a committee of several international law experts assembled under the auspices of the International Law Association, after an exhaustive survey of relevant state and international practice, found a wide range of customary international law norms concerning indigenous peoples, including "the right to be consulted with respect to any project that may affect them." As pointed out by the Claimants, the duty of states to consult with indigenous peoples is featured in the UN Declaration of the Rights of Indigenous Peoples, particularly in its Article 19 as well as in several other articles. In its Counter-Memorial the Respondent maintained in sweeping terms that the Declaration does not represent customary international law, as did Canada in its non-disputing party submission. However, when questioned by the Tribunal on this point at the hearing, the Respondents' counsel stated that some parts of the Declaration could reflect fundamental human rights principles and emerging customary law.

211. In any event, any obligations requiring consultation run between the state and indigenous peoples as such, that is, as collectivities bound in community. Article 19 of the U.N. Declaration provides that "States shall consult with indigenous *peoples* through their own representative institutions" (emphasis added). It would go well beyond any articulation of the indigenous consultation norm, as well as far beyond its conceptual foundations as understood by the Tribunal, to hold that the norm obliges consultations with individual investors such as Arthur Montour, who does not purport to have been endowed with authority to represent the First Nations communities of which he is a member in regard to the matters at hand. At the hearing, the Claimants' counsel argued, without any written authority or testimony by someone with direct relevant knowledge, that in the customs of the Haudenosaunee, sovereignty resides with

the individual. Hence, as relevant here, Arthur Montour should be seen as the beneficiary of the customary international law obligation for governments to consult with indigenous communities. Thus, the argument went, NAFTA entitled him to be directly consulted before the states took any action affecting his investment. The Tribunal finds this particular argument unpersuasive and unsubstantiated.

* * * *

227. As presented in the Claimants' Memorial and Reply, [the denial of justice portion of the Article 1105] claim argued that state legislatures perpetrated a denial of justice by enacting the Escrow laws to require the Claimants to escrow funds as a condition for off-reservation sales of Grand River's cigarettes, even though those cigarettes had not been judicially determined to harm any person. Posed this way, the claim is outside the Tribunal's jurisdiction. It is precluded under Paragraph 103 of the Tribunal's July 2006 Decision on Jurisdiction, which found that the Claimants' claims relating to the original enactment of the Escrow Laws were untimely and barred by NAFTA's Articles 1116(2) and 1117(2).

228. However, at the hearing, the Claimants emphasized the more recent Allocable Share Amendments, urging that their off-reservation sales were injured only as Grand River's cigarettes lost off-reservation market share following the amendments, so that their enactment resulted in a denial of justice. The Tribunal does not have jurisdiction regarding the claims of Kenneth Hill, Jerry Montour and Grand River related to those off-reservation sales. Accordingly, the [denial of justice] Article 1105 Claim as it pertains to those sales is outside the Tribunal's jurisdiction and is dismissed.

229. The Claimants' Memorial did not clearly set out a separate claim of denial of justice or otherwise under Article 1105 specifically related to Arthur Montour. While he and his companies have been involved in litigation in various courts in the United States, he was not heard to contend that his treatment in that litigation has not conformed to Article 1105. Moreover, as noted above, the Claimants' written materials disavowed any intention to dispute the operation of the U.S. court system, a position presumably shared by Mr. Montour. Accordingly, the [denial of justice portion of the] Article 1105 claim as it pertains to Mr. Montour is also dismissed.

* * * *

b. U.S. Statement in Canadian Court Set-Aside Proceedings: Cargill v. United Mexican States

On January 31, 2011, the United States submitted a brief as intervenor in an appeal brought by Mexico in the Court of Appeal for Ontario, Canada. The appeal arose from a lower court decision denying Mexico's request to set aside a NAFTA Chapter 11 award made in favor of Cargill, Inc. Mexico asserted that the NAFTA tribunal erred in awarding damages to Cargill for losses incurred by its U.S. production business in the form of lost sales to its Mexican subsidiary. The United States submitted that the Canadian courts should recognize that the scope of damages in a NAFTA Chapter 11 case is limited by NAFTA Articles 1101, 1116 and 1139 to losses sustained by the claimant in its capacity as "investor," that is, in seeking to make, making, or having made an "investment"—as that term is defined in NAFTA Article 1139—in the respondent State's territory. As evidence of subsequent practice by the parties

under the Vienna Convention on the Law of Treaties demonstrating this understanding, the U.S. pointed to several previous submissions by each of the three NAFTA Parties recognizing this limit on the scope of damages. The full text of the U.S. submission is available at www.state.gov/documents/organization/156082.pdf.

c. Second U.S. Article 1128 submission: Mobil Investments Canada Inc. v. Canada

On January 28, 2011, the United States made a second Article 1128 submission in the NAFTA Chapter 11 arbitration, *Mobil Investments Canada Inc. v. Government of Canada*. Both U.S. Article 1128 submissions in *Mobil Investments* related to measures subordinate to non-conforming measures reserved in NAFTA Annex I. According to NAFTA Annex I, a Party's reserved measures include "any subordinate measures adopted or maintained under the authority of and consistent with the [reserved] measure." The first Article 1128 submission filed by the U.S. in 2010 argued that the measures reserved in a Party's Annex I or Annex III Schedule of non-conforming measures can include not only measures subordinate to the reserved measure that existed prior to the NAFTA's entry into force, but also subordinate measures that were adopted after the NAFTA's entry into force. See *Digest 2010* at 471-74. After the hearing on the merits of the case, the tribunal asked both the U.S. and Mexico to provide additional clarification on two points related to measures subordinate to non-conforming measures reserved in NAFTA Annex I: (1) whether national law or the law of NAFTA or both should be used to determine whether subordinate measures are consistent with the measures reserved in a Party's Annexes; (2) whether the subordinate measure can be considered consistent if it "imposes additional and/or more onerous burdens." Excerpts from the U.S. submission addressing these questions follow (with footnotes omitted). The full text of the submission is available at www.state.gov/documents/organization/155736.pdf.

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3. In the determination of whether a subordinate measure is "consistent with the measure" under which it was authorized, both the law of the NAFTA and national law are relevant.

4. NAFTA Article 1131 provides that a tribunal under Chapter 11 shall "decide the issues in dispute in accordance with this Agreement and applicable rules of international law." With respect to the scope of non-conforming measure reservations in general, NAFTA Article 1132 permits a disputing Party to request that the NAFTA Free Trade Commission ("FTC") issue a binding interpretation on the issue of whether a challenged measure in a NAFTA Chapter 11 arbitration falls within the scope of a reservation or exception under Annex I. When a disputing Party does not seek an FTC interpretation pursuant to Article 1132, as in this case, the Tribunal must resolve any dispute over the scope of a reservation or exception under Annex I. In doing so, a Tribunal should apply standard treaty interpretation principles and interpret terms "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose," unless a "special meaning" was intended to apply to a term, in which case that "special meaning" shall be given effect. Vienna Convention on the

Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) (“VCLT”), Arts. 31(1), 31(4).

5. “Consistent with” is not defined in the NAFTA. The ordinary meaning of the term “consistent” is “in accord,” “compatible,” or “without contradiction.” The term “measure” is provided with a “special meaning” in the NAFTA, defined in Article 201(1) as “any law, regulation, procedure, requirement or practice,” and the meaning of the “Measures” element of Annex I reservations is specified in Annex I(2)(f), as discussed below.

6. A subordinate measure must be both authorized by and consistent with the “measure,” in order to fall within the relevant reservation listed in Annex I. Because a measure is taken by a Party under its national law, the Tribunal must look to the national law context under which the subordinate measure in question was adopted or maintained to determine whether it is in fact authorized under and consistent with the relevant measure.

7. Whether a subordinate measure is consistent with a measure is also a question of the NAFTA because, when viewed in the context of NAFTA Article 1108 and Annex I, a “subordinate measure” falls within the definition of a “measure” that has been exempted from conforming to certain NAFTA obligations. Pursuant to NAFTA Article 1108(1)(a), each NAFTA Party has taken “reservations and exceptions” with respect to existing measures that do not conform with certain NAFTA articles. According to Article 1108 (1)-(2), each Party was to set out in its Schedule to Annex I “any existing non-conforming measure” for which it was taking a reservation to articles 1102 (national treatment), 1103 (most-favored nation treatment), 1106 (performance requirements), and 1107 (senior management and board of directors). *See also* NAFTA Annex I(1). “Existing” is defined under NAFTA Article 201(1) to mean “in effect on the date of entry into force of this Agreement.” Also exempted from one or more of the four obligations listed above are “the continuation or prompt renewal of any nonconforming measure” listed in Annex I or III and amendments to those non-conforming measures “to the extent that the amendment does not decrease the conformity of the measure” with the listed obligations. NAFTA Art. 1108(1)(b)-(c). Parties have also reserved in Annex II “sectors, subsectors, or activities” that would be exempt from the four NAFTA obligations, but which are not subject to the requirement that amendments may not “decrease the conformity” of the measure (Article 1108(1)(c)).

8. Reflecting the Parties’ desire to promote transparency, which is one of the key objectives of the NAFTA (*see* NAFTA Art. 102(1)), Annex I(1) provides for the scheduling of exceptions “with respect to existing measures that do not conform with obligations imposed by” any of the four obligations to which non-conforming measure entries may be taken. Annex I(2) further requires Parties to elaborate certain “elements” of the reservation, including the relevant economic sector, sub-sector, and industry classification (§§(a)-(c)); the obligation from which the measure is reserved (§(d)); the level of government taking the reservation (§(e)), the measure itself (§(f)); the description of any liberalization commitments for, and remaining non-conforming aspects of, the reserved measure (§(g)); and the phase-out commitment, if any was made (§(h)). Thus, in Annex I, the Parties not only describe the existing non-conforming measures for which they are taking reservations, but also identify the non-conforming aspects of these measures. Annex I(3) also sets out certain rules of interpretation for construing reservations, including rules of priority for considering the different elements, specifying that “all elements of the reservation shall be considered” and that the “reservation shall be interpreted in light of the relevant provisions of the Chapters against which the reservation is taken.”

9. Read in context, then, and in light of the object and purpose of the NAFTA, the consistency of a subordinate measure with the reserved measure must be determined by reference to the national law governing the measures and the NAFTA. For the NAFTA, considerations in relevant cases would include the context of the reservation the Parties negotiated, including the NAFTA obligation from which the listed measure is reserved and the degree of the reserve measure's and subordinate measure's non-conformity with that obligation, and in light of the other elements of the reservation that would be relevant.

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10. Regarding the Tribunal's second question, the extent to which the imposition of "additional and/or more onerous burdens" would impact the analysis of whether a subordinate measure is "consistent with" an existing non-conforming measure reserved in Annex I, we note that this phrase, "additional and/or more onerous burdens," is not found in the NAFTA. As described above in Question 1, the answer to this question in a specific case would be determined by reference to (i) the domestic legal context of the measure; (ii) the particular aspects of the non-conforming measure entry and the subordinate measure, including, *inter alia*, the extent of nonconformity of each with the obligation against which the measure is reserved; and (iii) the specific facts and circumstances of the case. Such a determination would be difficult to make in the abstract or as a general rule.

* * * *

d. Apotex, Inc. v. United States of America

In 2011, the United States fully briefed the jurisdictional issues in the arbitration under NAFTA Chapter 11 brought by Apotex, Inc., a Canadian pharmaceuticals corporation. On March 15, 2011, the United States submitted its Statement of Defense, available at www.state.gov/documents/organization/159488.pdf. On May 16, the United States submitted its Memorial on Objections to Jurisdiction, available at www.state.gov/documents/organization/169493.pdf. Excerpts follow from the U.S. Reply on Objections to Jurisdiction, submitted October 17, 2011, and available at www.state.gov/documents/organization/177623.pdf. The tribunal established to hear the case convened for a hearing on jurisdictional issues in February 2012.

* * * *

2. Apotex Inc. (Apotex) is a Canadian manufacturer of generic drugs. The company has extensive facilities in Canada for developing, testing, producing, and labeling its drugs. By its own admission, "Apotex does not reside or have a place of business in the United States." Instead, Apotex exports its drugs from Canada to more than 115 countries around the world, including the United States, where they are sold by others.

3. Apotex alleges in this arbitration that it incurred substantial costs making abbreviated new drug applications (ANDAs) and complying with related regulatory standards in its testing,

manufacturing, and labeling operations in Canada to allow export of its generic sertraline and pravastatin drugs to the United States. Apotex does not allege that the United States rejected its sertraline and pravastatin ANDAs. To the contrary, Apotex acknowledges that the U.S. government granted final approval of its ANDAs in 2006 and 2007, thereby allowing Apotex to export its drugs to the United States for sale by others. Nor does Apotex allege that it was the first applicant of “paragraph IV certifications” for generic sertraline or pravastatin drugs, making it eligible for 180 days of market exclusivity. Rather, Apotex challenged other companies’ 180-day market exclusivity of generic sertraline and pravastatin drugs, and claims that Apotex’s own generic drugs should have been available for sale in the United States just months earlier than was permitted. Apotex believes that this NAFTA investment tribunal is the appropriate forum to address that complaint.

4. This Tribunal lacks jurisdiction to hear Apotex’s claims, for three reasons. First, Apotex lacks standing to bring a claim under NAFTA Chapter Eleven. Apotex purports to be an “investor” that made “investments” in the territory of the United States, but it has produced no evidence to that effect, and its own pleadings affirmatively belie its conclusory statements.

5. Apotex asserts, without establishing, that an ANDA is an “investment” under Article 1139(g), because it constitutes “property” in the United States. Apotex’s claims, however, are not related to its approved ANDAs. Apotex thus asserts that its tentatively-approved applications for revocable permission to export its generic products to the United States for sale by others constitute property in the United States. Whether tentatively or finally approved, however, ANDAs are not “property” for purposes of NAFTA Chapter Eleven.

6. Apotex further claims to have made an “investment” as defined in Article 1139(h), which includes “interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory[.]” Illustrative examples under Article 1139(h) include interests in a construction contract or a government concession. Apotex’s only evidence of these alleged “interests” consists of statements that the company (1) purchased goods in the United States for export to Canada for purposes of manufacturing its products there; (2) designated an agent and distributor to sell its products in the United States; and (3) incurred expenses from filing lawsuits in U.S. courts concerning its drug applications.

7. These activities, on their face, are not “interests” arising from the commitment of capital or other resources in the United States, and thus are not “investments in the territory of the United States” under NAFTA Chapter Eleven. Indeed, if a Canadian or Mexican exporter could transform itself into an “investor” with an “investment” in the United States simply by designating a U.S. agent and distributor, purchasing U.S. goods for export, and filing a lawsuit to further its cross-border trade, then presumably every such exporter could bring its trade-related disputes to investment arbitration under the NAFTA. NAFTA Chapter Eleven, however, expressly defines the “investors” and “investments” entitled to protection so as to prohibit such bootstrapping. On the terms of Apotex’s own submission, it is not an investor that has made investments under NAFTA Chapter Eleven, and thus its claims should be dismissed in their entirety.

8. Second, regardless of whether Apotex qualifies as an “investor” or its activities were “investments” under the NAFTA, the Tribunal cannot hear Apotex’s pravastatin claim challenging a final ruling of the U.S. Food and Drug Administration (FDA), as that claim is time-barred. Apotex acknowledges that, in accordance with NAFTA Article 1116(2), it cannot bring a claim if more than three years have elapsed from the date on which it first acquired, or should have acquired, knowledge of an alleged breach and resulting loss or damage. Apotex

further acknowledges that the challenged FDA measure occurred more than three years before Apotex brought its NAFTA claim. Apotex contends, however, that bringing a court action against a regulatory measure somehow revives or tolls claims based on that measure. Apotex has cited no support for this assertion, and, in fact, NAFTA Chapter Eleven tribunals have specifically rejected such an argument. Were it otherwise, any claimant could evade NAFTA's clear and rigid limitations period by seeking judicial review of a challenged measure within three years of filing a NAFTA claim. Apotex's argument thus must be rejected, along with its challenge to the FDA measure.

9. Third—again assuming for the purpose of argument that Apotex could meet the threshold for protection under the NAFTA as an investor—the Tribunal cannot hear Apotex's challenge to the U.S. courts' adjudication of Apotex's pravastatin claim, because Apotex failed to obtain the judicial finality that is required before bringing an international claim. Apotex concedes that a claimant challenging a court action under NAFTA Chapter Eleven must obtain a final decision of the highest court of the host State, unless further judicial recourse would have been "obviously futile." Apotex further concedes that after the U.S. Court of Appeals for the D.C. Circuit denied en banc Apotex's petition for rehearing its motion for a preliminary injunction, Apotex could have sought certiorari from the U.S. Supreme Court or resumed its claim in the district court for a decision on the merits. Apotex contends, however, that such action would have been pointless, as the 180-day market exclusivity for generic pravastatin granted to another company likely would have run in 67 days, before either court could have given Apotex the relief it sought.

10. Apotex's excuse is both insufficient and erroneous. Apotex cannot challenge non-final judicial acts under NAFTA Chapter Eleven unless it demonstrates obvious futility, not the improbability of success. Under international law, the question of whether the failure to obtain judicial finality may be excused for "obvious futility" turns on the unavailability of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired relief.

11. As a factual matter, moreover, although the 180-day market exclusivity period had begun to run on the 10, 20, and 40 mg strengths of pravastatin, it had not begun to run on the 80 mg strength, and thus Apotex had ample time, at a minimum, to continue litigating its claim on the merits with respect to that strength. Apotex had two avenues to pursue further relief in U.S. courts, but chose instead to dismiss its claims voluntarily. Apotex's pravastatin claim based on judicial acts, therefore, must be dismissed.

12. For these reasons, and those set forth below, the Tribunal should dismiss Apotex's claims in their entirety for lack of jurisdiction, and award costs to the United States.

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2. Resolution of Cross-Border Trucking Dispute

On July 6, 2011, U.S. Transportation Secretary Ray LaHood and Mexican Secretary of Communication and Transportation Dionisio Arturo Pérez-Jácome Friscione signed a Memorandum of Understanding on Cross-Border Motor Trucking ("MOU"), aimed at resolving a long-standing dispute over implementation of the provisions of the NAFTA concerning cross-border long-haul trucking. The agreement is available at

www.fmcsa.dot.gov/documents/Mexican_MOU_Enq.pdf. For background on the dispute, see *Digest 2010* at 474, *Digest 2009* at 418–19, and *Digest 2007* at 556–62. U.S. Trade Representative Ron Kirk issued the following statement when Mexico began lifting retaliatory tariffs shortly after the MOU was signed:

At President Obama’s direction, the cross-border trucking dispute between the U.S. and Mexico has been resolved in a way that addresses safety concerns and upholds our trade obligations. With Mexico’s announcement that it has cut tariffs on products exported from the U.S. by half, American manufacturers, farmers, ranchers, and companies will be able to better compete for customers in Mexico. Many of our workers build, grow and produce products that are then sold to our neighbors in Mexico, and this Administration is committed to expanding their opportunities to support well-paying jobs here at home and to continue rebuilding the U.S. economy.

Ambassador Kirk’s statement is available at www.ustr.gov/about-us/press-office/press-releases/2011/july/statement-ambassador-ron-kirk-reduction-tariffs-us-ex. See also July 6, 2011 press release, available at www.ustr.gov/about-us/press-office/press-releases/2011/july/ustr-kirk-friday-mexico-drop-retaliatory-tariffs-fift.

C. WORLD TRADE ORGANIZATION

1. Dispute Settlement

U.S. submissions in WTO dispute settlement cases are available at www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement. The following discussion of a selection of WTO disputes involving the United States is drawn largely from Chapter II, “World Trade Organization,” of the 2011 Annual Report of the President of the United States on the Trade Agreements Program (“2011 Annual Report”), available at www.ustr.gov/about-us/press-office/reports-and-publications/2012-0. WTO legal texts referred to below are available at www.wto.org/english/docs_e/legal_e/legal_e.htm.

a. Disputes brought by the United States

(1) Disputes brought by the United States against China

(i) *China—Measures Relating to the Exportation of Various Raw Materials (DS394)*

As discussed in *Digest 2009* at 423–24, in 2009, the United States requested consultations with China, and then requested the establishment of a dispute settlement panel, regarding China’s export restraints on various raw materials used in the production of steel, aluminum, and chemicals. On July 5, 2011, the WTO panel circulated its report. The 2011 Annual Report (at 67) summarized the panel’s findings in the case as follows:

The panel found that the export duties and export quotas that China maintains on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, and zinc constitute a breach of WTO rules and that China failed to justify those measures as legitimate conservation measures, environmental protection measures, or short supply measures. The panel also found that China's imposition of minimum export price, export licensing, and export quota administration requirements on these materials, as well as China's failure to publish certain measures related to these requirements, is inconsistent with WTO rules.

China filed a notice of appeal on August 31, 2011. The Appellate Body is scheduled to provide its report at the end of January 2012.

(ii) Results of consultations requested in 2010 in three disputes with China

As discussed in *Digest 2010* at 475-78, the United States requested consultations with China on three matters during 2010. In two of the matters, consultations did not resolve the disputes and the United States requested the establishment of a panel. In February 2011, the United States requested the establishment of panels in *China – Certain Measures Affecting Electronic Payment Services (DS413)* and *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States (DS414)*. Panels were established in both disputes in March. In the third matter, *China—Subsidies on Wind Power Equipment (DS 419)*, the United States and China held consultations in February 2011 that led to the resolution of the dispute, as described in the 2011 Annual Report at 68: “Following consultations, China issued a notice invalidating the measures that had created the program providing the challenged subsidies.”

(iii) New request for consultations: China—Countervailing and Anti-Dumping Duties on Chicken Broiler Products from the United States (DS427)

On September 20, 2011, the United States filed a request for consultations regarding China's imposition of antidumping and countervailing duties on imports of chicken broiler products from the United States. The United States and China held consultations in October 2011, but were unable to resolve the dispute. On December 8, 2011, the United States requested the establishment of a panel. The 2011 Annual Report at 75 summarized the background of the dispute:

On September 27, 2009, China's Ministry of Commerce (MOFCOM) initiated antidumping and countervailing duty investigations of imports of chicken broiler products from the United States. On September 26, 2010 and August 30, 2010, China imposed antidumping and countervailing duties, respectively. In the antidumping investigation, China imposed dumping duties ranging from 50.3 percent to 53.4 percent for the participating U.S. producers and exporters, and set an “all others” rate of 105.4 percent. In the countervailing duty investigation, China imposed countervailing duties

between 4.0 percent and 12.5 percent for the participating U.S. producers and exporters and an “all others” rate of 30.3 percent.

In levying the antidumping and countervailing duties, China appears to have acted inconsistently with numerous WTO obligations. In particular, the United States is concerned that Chinese authorities failed to abide by applicable procedures and legal standards, including by finding injury to China’s domestic industry without objectively examining the evidence, by improperly calculating dumping margins and subsidization rates, and by failing to adhere to various transparency and due process requirements.

(2) Dispute brought by the United States against the European Union: *Subsidies on large civil aircraft (DS316)*

In this dispute dating back to 2004, the United States challenged subsidies provided to Airbus by the European Union, France, Germany, Spain, and the United Kingdom. For background, see *Digest 2004* at 603-4, *Digest 2005* at 622, and *Digest 2010* at 480-81. On June 1, 2011, the WTO’s Dispute Settlement Body (“DSB”) adopted the report of the Appellate Body, which affirmed the panel’s main findings in favor of the United States, with some modifications. Excerpts below from the 2011 Annual Report at 72 discuss the Appellate Body’s report and the EU’s compliance with the DSB rulings.

The Appellate Body affirmed the panel’s central findings that European government launch aid had been used to support the creation of every model of large civil aircraft produced by Airbus. The Appellate Body also confirmed that launch aid and other challenged subsidies to Airbus have directly resulted in Boeing losing sales involving purchases of Airbus aircraft by easyJet, Air Berlin, Czech Airlines, Air Asia, Iberia, South African Airways, Thai Airways International, Singapore Airlines, Emirates Airlines, and Qantas – and lost market share, with Airbus gaining market share in the European Union and in third country markets, including China and South Korea at the expense of Boeing. The Appellate Body also found that the panel applied the wrong standard for evaluating whether subsidies are export subsidies, and that the panel record did not have enough information to allow application of the correct standard.

On December 1, 2011, the EU provided a notification in which it claimed to have complied with the DSB recommendations and rulings. On December 9, 2011, the United States requested consultations regarding the notification and also requested authorization from the DSB to impose countermeasures.

b. Disputes brought against the United States

(1) *United States—Definitive Antidumping and Countervailing Duties on Certain Products from China (DS 379)*

China initiated this dispute in 2008, challenging antidumping and countervailing duties imposed by the United States as a result of investigations on circular welded carbon quality steel pipe, certain pneumatic off-the-road tires, light-walled rectangular pipe and tube, and laminated woven sacks. After the panel found in favor of the United States in several

respects in 2010, China appealed. The excerpt below from the 2011 Annual Report at 92-92 describes the proceedings on appeal in 2011.

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On December 1, 2010, China filed a notice of appeal of certain of the panel's findings. China contended that: (1) the panel erred in its interpretation and application of the term "public body" in Article 1 of the SCM Agreement [the Agreement on Subsidies and Countervailing Measures]; (2) the panel erred in its interpretation and application of Article 2 of the SCM Agreement regarding Commerce's specificity determinations; (3) the panel erred in its interpretation and application of Article 14(d) of the SCM Agreement and its finding that Commerce's determination to reject in country private prices as benchmarks for measuring the benefit of government provided hot rolled steel was not inconsistent with that provision was erroneous; (4) the panel erred in its interpretation and application of Article 14(b) of the SCM Agreement and its finding that the benchmark Commerce used to measure the benefit of government provided loans was not inconsistent with that provision was erroneous; and (5) the panel erred in concluding that the concurrent application to imports from China of countervailing duties and antidumping duties calculated using an NME [non market economy] methodology was not inconsistent with the WTO obligations of the United States. The Appellate Body conducted an oral hearing on these issues on January 13-14, 2011.

The Appellate Body circulated its report on March 11, 2011. The Appellate Body reversed the panel's finding with respect to the concurrent application of antidumping duties calculated using a NME methodology and countervailing duties to imports from China, finding that the United States acted inconsistently with Article 19.3 of the SCM Agreement by failing to examine whether a "double remedy" arose from such concurrent application and by failing to avoid any such "double remedy." The Appellate Body also reversed the panel's finding with respect to the meaning of "public body" in Article 1.1(a)(1) of the SCM Agreement, finding that the term "public body" means an entity that possesses, exercises, or is vested with governmental authority. Using this definition, the Appellate Body completed the analysis and found that Commerce's public body determinations with respect to SOEs [state owned enterprises] were inconsistent with Article 1.1(a)(1), while Commerce's public body determinations with respect to SOCBs [state owned commercial banks] were not inconsistent with Article 1.1(a)(1). The Appellate Body also upheld the panel's findings with respect to Commerce's use of external benchmarks and Commerce's specificity determinations.

On March 25, 2011, the DSB adopted its recommendations and rulings in this dispute. At the following DSB meeting, on April 21, 2011, the United States informed the DSB of its intention to implement the recommendations and rulings of the DSB in connection with this matter. The United States and China agreed that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB would end on February 25, 2012.

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(2) *United States—Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products (DS381)*

Mexico requested consultations in 2008 regarding U.S. dolphin-safe labeling for tuna and tuna products. U.S. laws and regulations prohibit labeling tuna and tuna products as dolphin-safe if the tuna was caught using purse-seine nets intentionally set on dolphins, a technique Mexico uses. On September 15, 2011, the WTO panel established to examine these measures issued its report. A summary of the panel's findings, available at www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm#bkmk381r, is excerpted below.*

* * * *

This dispute concerns the following measures: (i) the United States Code, Title 16, Section 1385 (“Dolphin Protection Consumer Information Act”), (ii) the Code of Federal Regulations, Title 50, Section 216.91 (“Dolphin-safe labeling standards”) and Section 216.92 (“Dolphin-safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large purse seine vessels”) and (iii) the ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007). These measures establish the conditions for use of a “dolphin-safe” label on tuna products. The measures condition the access to the US Department of Commerce official dolphin-safe label upon bringing certain documentary evidence that varies depending on the area where tuna contained in the tuna product is harvested and the fishing method by which it is harvested.

Mexico’s main claims were that the measures were discriminatory, and that they were also unnecessary.

The Panel first determined whether the US dolphin-safe labelling provisions constitute a technical regulation under the TBT Agreement. The Panel found that they do, and in particular that the measures are mandatory within the meaning of Annex 1.1 of the TBT [Technical Barriers to Trade] Agreement. One of the members of the Panel expressed a dissenting opinion on this particular issue but sided with the majority for the rest of the report. The Panel then examined Mexico’s claims under Articles 2.1, 2.2, and 2.4 of the TBT Agreement.

The Panel rejected Mexico’s first claim by finding that the US dolphin-safe labelling provisions do not discriminate against Mexican tuna products and are therefore not inconsistent with Article 2.1 of the TBT Agreement. Despite finding that Mexican tuna products are like tuna products originating in the United States or any other country within the meaning of Article 2.1 of the TBT Agreement, the Panel concluded that Mexican tuna products are not afforded less favourable treatment than tuna products of US and other origins in respect of the US dolphin safe labelling provisions on the basis of their origin.

With respect to Mexico’s claim under Article 2.2 of the TBT Agreement, the Panel found that Mexico had demonstrated that the US dolphin-safe labelling provisions are more trade-restrictive than necessary to fulfil the legitimate objectives of (i) ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins and (ii) contributing to the protection of dolphins, by ensuring that the

* In January 2012, both Mexico and the United States notified the DSB of their decisions to appeal certain aspects of the panel’s report.

US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins, taking account of the risks non-fulfilment would create. The Panel's conclusion was based on the following two findings: (i) the findings that the US dolphin-safe labelling provisions only partly address the legitimate objectives pursued by the United States and (ii) the finding that Mexico had provided the panel with a less trade restrictive alternative capable of achieving the same level of protection of the objective pursued by the US dolphin-safe labelling provisions.

As regards Mexico's claim under Article 2.4 of the TBT Agreement, the Panel found that the US dolphin-safe labelling provisions are not in violation of such provision, which requires technical regulations to be based on relevant international standards where possible. Despite finding that the standard referred to by Mexico is a relevant international standard for the purposes of the US dolphin-safe provisions and that the United States has not used it as basis for its measures, the Panel concluded that this standard would not be appropriate or effective to achieve the US objectives.

The Panel declined to rule in addition on Mexico's non-discrimination claims under the GATT 1994 and therefore exercised judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT.

* * * *

(3) United States – Certain Country of Origin Labeling (COOL) Requirements (Canada) (DS384) and (Mexico) (DS386)

On November 18, 2011, a single panel issued its report on disputes brought separately by Canada and Mexico challenging U.S. country of origin labeling ("COOL") requirements. Excerpts from the separate discussion of the Canadian and Mexican disputes in the 2011 Annual Report at 94-96 have been consolidated below to describe the panel's findings.

* * * *

The final report found that the COOL measure (the COOL statute and USDA's Final Rule together), in respect of muscle cut meat labels, breaches [Agreement on Technical Barriers to Trade] Article 2.1 because it affords Canadian [and Mexican] livestock less favorable treatment than it affords U.S. livestock. Under the Technical Barriers to Trade (TBT) Article 2.2, the panel found that the objective of the COOL measure was to provide consumers with information about the origin of the meat products that they buy at the retail level, and that consumer information on origin is a legitimate objective that WTO Members, including the United States, are permitted to pursue with their measures. However, the panel found that the COOL measure breaches TBT Article 2.2 because it fails to fulfill its legitimate objective of providing consumer information on origin with respect to meat products. The panel also found that the Vilsack Letter [a February 20, 2009 letter issued by the Secretary of Agriculture] breaches GATT Article X:3 because it does not constitute a reasonable administration of the COOL measure.

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The panel rejected Mexico's claim under TBT Article 2.4 that the United States was required to base origin under the COOL measure on the principle of substantial transformation, concluding that using this principle would be an ineffective and inappropriate means to fulfill the U.S. legitimate objective of providing consumers with information about the origin of the meat products they buy. The panel also rejected Mexico's claims under TBT Articles 12.1 and 12.3, concluding that the United States did not fail to take account of Mexico's needs as a developing country Member.

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(4) United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China (DS399)

For background on this dispute, see *Digest 2010* at 486-87. On May 24, 2011, China filed a notice of appeal with respect to the panel's report issued in 2010 finding that the U.S. duty on passenger vehicle and light truck tires imported from China did not violate the GATT 1994 or China's Protocol on Accession. The Appellate Body upheld all of the panel's findings in a report circulated on September 5, 2011.

(5) Zeroing

As discussed in *Digest 2010* at 487-90, the United States has taken steps to comply with findings adopted by the DSB in several disputes challenging the U.S. practice of "zeroing" in antidumping administrative reviews. Additional panel reports issued in 2011 also found the past practice of zeroing to be inconsistent with U.S. obligations. In *United States – Antidumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil (DS382)*, discussed in the 2011 Annual Report at 94, the panel found that the use of zeroing was inconsistent with the Antidumping Agreement. The DSB adopted the panel's recommendations and ruling on June 17, 2011. The United States stated its intention to implement the recommendations and ruling. In *United States – Use of Zeroing in Antidumping Measures Involving Products from Korea (DS402)*, discussed in the 2011 Annual Report at 96-97, the panel circulated its report on January 18, 2011, finding that the United States' use of zeroing methodology was inconsistent with its WTO obligations. On February 24, 2011, the DSB adopted the panel's recommendations and rulings. The United States agreed to implement the recommendations and rulings and notified the DSB on December 19, 2011 that it had done so. In *United States – Anti-dumping Measures on Certain Shrimp from Vietnam (DS404)*, discussed in the 2011 Annual Report at 97-98, the panel issued its report on July 11, 2011 finding the use of zeroing to be inconsistent with the Antidumping Agreement and the GATT 1994. On September 2, 2011, the DSB adopted the panel's recommendations and rulings. The United States stated its intention to comply with the recommendations and rulings within a reasonable period.

2. WTO Accession: Russia, Samoa, Montenegro, and Vanuatu

On December 16, 2011, trade representatives at the 8th Ministerial Conference of the World Trade Organization adopted the terms and conditions for Russia's accession to the WTO and invited Russia to join the organization. For more information on the terms for Russia's accession, see www.wto.org/english/news_e/news11_e/acc_rus_16dec11_e.htm. The United States strongly supported Russia's accession to the WTO. President Obama congratulated Russian President Dmitri Medvedev prior to the 8th Ministerial Conference when the negotiations on terms and conditions for accession were concluded on November 10, 2011, saying:

Since the beginning of my administration, and with increased intensity after President Medvedev and I met in Washington in June 2010, I have supported Russia's WTO accession. Russia's membership in the WTO will lower tariffs, improve international access to Russia's services markets, hold the Russian Government accountable to a system of rules governing trade behavior, and provide the means to enforce those rules.

Daily Comp. Pres Docs. 2011 DCPD No. 00848, p. 1.

United States Trade Representative Ron Kirk said in a statement released the same day as the action at the 8th Ministerial Conference: "Russia's accession is good for the United States, good for Russia, and good for the WTO. This marks an important turning point in making the WTO truly a 'world' trade organization." December 16, 2011 USTR Press Release, available at www.ustr.gov/about-us/press-office/press-releases/2011/december/us-trade-representative-kirk-welcomes-invitation. USTR also issued a fact sheet, excerpted below and available at www.ustr.gov/webfm_send/3212, listing the benefits of Russia's accession.

The United States also welcomed the approval in 2011 of terms for accession by Samoa, Montenegro and Vanuatu. See December 17, 2011 USTR Press Release, available at www.ustr.gov/united-states-welcomes-invitations-montenegro-samoa-join-world-trade-organization-0.

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This decision of the Ministerial Conference represents the substantive conclusion of 18 years of negotiations. Those negotiations have generated results that will liberalize Russia's market through a reduction in tariffs for imports of goods and agreed terms for access to Russia's market for services. In addition, and of critical importance, the terms of Russia's WTO accession spell out the way in which Russia will apply and implement all elements of the WTO "rule book," including in areas of critical importance to U.S. exporters and workers.

Key benefits arising from Russia's membership in the WTO include:

- A Stronger Mechanism for U.S.-Russia Trade Relations: Russia is the largest nation to remain outside the WTO, and its WTO membership will link Russia to the same set of rules that apply to 153 other Members. This will afford U.S. trade policymakers with a new and critical set of tools to ensure fair and rules-based treatment of U.S. exports.

- **Reduced Russian Tariffs on Key U.S. Exports** : As part of its WTO accession Russia will bind its tariffs on all products. In addition to joining the Information Technology Agreement, Russia is making meaningful commitments to cut tariffs in important export sectors such as chemicals, civil aircraft, agriculture equipment, construction equipment, and medical equipment, as well as dairy, grains, oilseeds, horticultural products, wine, and meat.
- **More Liberal Russian Treatment for U.S. Services Exports**: Russia is undertaking enforceable market access commitments covering services sectors that are priorities for the United States, including audio-visual, telecommunications, financial services (including insurance, banking and securities), energy services, computer services and retail services.
- **Firm Commitments for the Protection and Enforcement of Intellectual Property Rights**: In joining the WTO, Russia will implement with immediate and enforceable effect all provisions of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). Due to U.S. engagement with Russia over recent years, Russia has already amended its domestic laws to comply with the TRIPs Agreement. As a WTO Member, Russia will be required to enforce those laws in compliance with relevant WTO provisions.
- **Enforceable Disciplines to Ensure Rules-Based Treatment of U.S. Agricultural Exports**: The terms of Russia's accession contain extensive commitments ensuring Russia's compliance with WTO rules on sanitary and phytosanitary (SPS) measures, providing U.S. exporters of meat and other agricultural products with an enforceable set of disciplines against trade restrictions that are not science-based. As part of joining the WTO, Russia and its Customs Union partners Kazakhstan and Belarus have developed an entirely new and WTO-consistent legal framework to ensure consistency with WTO SPS rules. Russia will be applying these rules from "day one" of its WTO membership.
- **Improved Transparency in Trade-Related Rule-Making**: Russia's WTO accession package contains important disciplines governing transparency in the development of trade policies and measures, including publication of draft rules and opportunities for public comments on those rules prior to their adoption.

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3. Conclusion of revised WTO Government Procurement Agreement

Also at the 8th Ministerial Conference of the WTO in December 2011, the ministers representing parties to the WTO Government Procurement Agreement ("GPA") reached agreement on revisions to the text of the GPA and expansion of its coverage. A USTR Fact Sheet, excerpted below and available at www.ustr.gov/about-us/press-office/fact-sheets/2011/december/benefits-united-states-revised-wto-government-procur, identified benefits of the revised GPA. For more information on the GPA, see www.wto.org/english/news_e/news11_e/qpro_15dec11_e.htm.

* * * *

New Opportunities with Central Government Entities

The revised agreement will give U.S. suppliers access to more than 150 additional central government entities in European Union Member States, including Bulgaria, Finland, France, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovakia, Romania, and Sweden.

U.S. suppliers will also gain access to a number of additional central government entities in other GPA Parties, including in Aruba, Hong Kong, Israel, Liechtenstein, Korea, and Switzerland. U.S. suppliers will also gain new market access through the reduction of thresholds – the monetary value below which contracts are not covered—in several Parties, including Israel, Japan and Aruba.

New Opportunities with Sub-Central Government Entities

GPA Parties including Japan, Korea, and Israel have added a number of sub-central entities. Canada is providing access to its provinces for the first time under the revised GPA. (The United States has been able to participate in Canadian provincial procurement since February 2010 when it signed a bilateral agreement with Canada.)

New Opportunities with Government Enterprises

The GPA Parties will also expand the government enterprises that they cover under the GPA. This will include new enterprises in Israel such as the Environmental Services Company and development companies, as well as new entities from Japan, Korea, Liechtenstein and Chinese Taipei.

New Opportunities in Services Sectors

Already-competitive U.S. services suppliers will find new opportunities with the addition of more than 50 categories of services in Aruba, Hong Kong, Israel, Japan, Korea, Singapore, and Switzerland. This includes complete coverage of the telecommunications sector in several Parties.

Phase-out of Israel's Requirements for Domestic Content

A major achievement of the negotiations is Israel's commitment to phase out the offsets—requirements for domestic content—that it has maintained since 1981. Over 15 years, Israel will progressively reduce its application of these offsets to zero from the current 20%, reduce the number of entities that apply offsets, and set a threshold below which offsets will not be applied.

Support for Modern Business Practices in Government Procurement

The modernized text updates the GPA to incorporate current procurement practices, in particular through the use of electronic procurement in GPA member countries. It significantly clarifies GPA requirements, increases transparency of procurement practices through electronic methods, provides more flexibility for procuring entities, especially when buying commercial (off-the-shelf) goods and services, and promotes the adoption of such practices in potential future member countries. The revised GPA specifies the transitional measures for developing countries, which should facilitate the accession of developing countries to the GPA.

U.S.-EU Bilateral Procurement Forum

In conjunction with the conclusion of the GPA revision, the United States and the European Union will establish a Bilateral Procurement Forum that will provide an opportunity to expand our procurement relationship on a bilateral basis. Under this Forum, we will take up procurement regulatory issues and international procurement issues, such as China's accession to the GPA—a key priority for both sides. In addition, the United States and the EU will explore the possible expansion of procurement commitments, primarily on a national treatment basis.

The United States will only cover procurement of sub-central entities, such as states, with that entity's authorization.

Maintaining Priorities for Small and Minority Firms

Under the revised Government Procurement Agreement, the United States maintains all of its current exclusions and exceptions, including its exclusion of set-asides for small and minority firms.

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D. OTHER TRADE AGREEMENTS AND TRADE-RELATED ISSUES

1. Trade Legislation and Trade Preferences

a. Generalized System of Preferences

On October 21, 2011, President Obama signed legislation authorizing the Generalized System of Preferences ("GSP") program through July 31, 2013 and retroactively applying GSP trade benefits for eligible products that entered the United States on or after January 1, 2011. Pub. L. 112-40. Congress created the GSP program in the Trade Act of 1974, 19 U.S.C. 2461 et seq., to help developing countries expand their economies by allowing certain goods to be imported to the United States duty free. Under the GSP program, 129 beneficiary developing countries, including 42 least-developed countries, are eligible to export up to 4,881 types of products to the United States duty-free. After the GSP program was reauthorized in 2011, USTR completed its 2010 Annual Review of the program and granted one petition for removal of a product (certain non-down sleeping bags) and denied one petition for removal of another product (two types of self-adhesive plastic tape) from eligibility for duty-free treatment under the GSP program. 77 Fed. Reg. 1549 (Jan. 10, 2012). See USTR December 29, 2011 Press Release, available at www.ustr.gov/about-us/press-office/press-releases/2011/december/ustr-announces-outcome-generalized-system-preference.

b. African Growth and Opportunity Act

On October 25, 2011, President Obama signed a presidential proclamation designating Cote d'Ivoire, Guinea, and Niger as eligible for benefits under the African Growth and Opportunity Act ("AGOA"), title I of Public Law 106-200. Daily Comp. Pres. Docs. 2011 DCPD No. 00790, p. 1. AGOA amended the Trade Act of 1974, 19 U.S.C. § 2462, to authorize the President to designate certain listed countries as a "beneficiary sub-Saharan African country" if the President determines that the country meets certain eligibility requirements in the AGOA and the Trade Act of 1974.

In December 2011, United States Trade Representative Ron Kirk announced that all 40 of the countries then eligible for benefits under AGOA would remain eligible in 2012. USTR December 29, 2011 Press Release, available at www.ustr.gov/about-us/press-office/press-releases/2011/december. As explained in the USTR Press Release, criteria for eligibility for benefits under AGOA include:

establishing, or making continual progress towards establishing, a market-based economy, rule of law, economic policies to reduce poverty, protection of internationally recognized worker rights, and efforts to combat corruption. Countries eligible for AGOA also may not engage in activities that undermine U.S. foreign policy interests, or engage in gross violations of internationally recognized human rights.

2. Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA-DR”)

The text of the CAFTA-DR is available at www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

a. Meeting of the CAFTA-DR Free Trade Commission

The first meeting of the CAFTA-DR Free Trade Commission was held on February 22-23, 2011, in San Salvador, El Salvador. The parties released a joint statement at the conclusion of the meeting, excerpted below. The full text is available at www.ustr.gov/about-us/press-office/press-releases/2011/february/joint-statement-meeting-dominican-republic-centra.

* * * *

At the CAFTA-DR Free Trade Commission (FTC) meeting today, we celebrated the five year anniversary since El Salvador and the United States implemented the Agreement. Despite the economic challenges faced by the global economy in recent years, total (two way) trade between the United States and the Central American partners and the Dominican Republic grew from \$35 billion in 2005 prior to the implementation of the agreement to \$48 billion in 2010. Intra-regional trade among the Central American countries and the Dominican Republic increased from \$4.2 billion to over \$6.3 billion over the same period. Foreign investment flows in the region are even more remarkable. The average annual investment inflows into the Central American countries and the Dominican Republic in the first four years of the Agreement were \$6.3 billion, or 123 percent higher than the \$2.8 billion annual average during 2000-2005 before implementation.

* * * *

To expand and broaden the benefits of the Agreement and support jobs in our respective countries, we agreed to cooperate on several new initiatives. We endorsed regional trade facilitation initiatives to foster greater regional integration, enhance competitiveness and expand the benefits of the trade agreement, with special attention to promoting greater participation by SMEs [Small and Medium-sized Enterprises].

We welcomed the inventory of trade facilitation projects prepared with the support of the Inter-American Development Bank, which will facilitate future discussions and activities. We thanked the Inter-American Development Bank for the valuable support that it has provided thus far as part of this phase and we requested their continued support as we move forward with the second phase of this effort. Therefore, we instructed our senior officials to undertake a process of consultation with stakeholders and self assessments to identify remaining challenges and to share

best practices, including policies, programs and practices that countries can adopt to facilitate trade.

We have identified initial cooperative actions in the context of the CAFTA-DR Trade in Goods and Technical Barriers to Trade Committees to be implemented in the short term. We look forward to identifying further cooperative endeavors and to receiving a report on progress at the next Free Trade Commission meeting.

Recognizing the essential role that SMEs play in creating jobs in all of our countries, we discussed ways to help SMEs take advantage of the export opportunities that the Agreement provides. One of the challenges that SMEs face is access to relevant information on the opportunities that the Agreement offers and how to pursue these opportunities. To help address this, we released a brochure entitled “[Frequently Asked Questions About Opportunities for Small Businesses to Export in the CAFTA-DR Region](#)”, a publication designed to answer basic questions for firms that are considering exporting for the first time. This document will be available on each of our websites in both Spanish and English.

* * * *

Recognizing the critical importance of trade in agricultural products and the jobs and workers that are sustained by agriculture in all our countries, we formally established the Committees on Agricultural Trade and Sanitary and Phytosanitary (SPS) Matters as required by the Agreement. These committees will lead the way in promoting cooperation and communication between our countries on the implementation of our obligations so that our respective agricultural sectors can realize fully the opportunities offered by the CAFTA-DR Agreement.

We approved a series of changes to the Agreement’s rules-of-origin for textile and apparel goods that will facilitate regional trade and integration. These changes will expand opportunities under the CAFTA-DR Agreement and encouraging a vibrant textile and apparel supply chain in the Western Hemisphere to effectively face the challenge that Asian competitors represent.* We also agreed to increase the cumulation limits to encourage greater integration of regional production through limited reciprocal duty-free access with Mexico and Canada to be used in Central American and Dominican Republic apparel, as called for under the Agreement.

We established four rosters of potential panelists for disputes that may arise under the Agreement concerning general matters, as well as under the labor or environment chapters or financial services provisions of the Agreement. We also established model rules of procedure for dispute settlement panels and a code of conduct for panelists to guide dispute settlement proceedings under the Agreement.

* Editor’s note: According to the Office of the U.S Trade Representative, one of the most significant changes was the clarification that certain monofilament sewing thread is now required to originate or be produced in the United States or the CAFTA-DR region in order for goods to qualify for preferential treatment. See May 2011 USTR Fact Sheet, “CAFTA-DR Textiles,” available at www.ustr.gov/about-us/press-office/fact-sheets/2011/may/cafta-dr-textiles.

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b. Labor: Request for Arbitral Panel on Guatemala Labor Practices

On August 9, 2011, the United States requested the establishment of an arbitral panel pursuant to the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA-DR”) to consider whether the Government of Guatemala was complying with its obligations under Article 16.2.1(a) of the CAFTA-DR. Request for Arbitration, available at www.ustr.gov/webfm_send/3042. The dispute concerns Guatemala’s apparent failure to meet its obligations under the CAFTA-DR with respect to the effective enforcement of its labor laws. The United States had availed itself of other procedures under the CAFTA-DR before resorting to the request for a panel. The dispute arose in April 2008 after the AFL-CIO and six Guatemalan worker organizations filed a public submission under the CAFTA-DR alleging that the Guatemalan government had violated its CAFTA-DR labor commitments. The U.S. Government reviewed the submission and then conducted its own examination—including collection of evidence and legal analysis—of Guatemala’s compliance with its commitments under the CAFTA-DR labor chapter. Based on that examination, the U.S. Government concluded that Guatemala appeared to be failing to meet its obligation with respect to enforcement of labor laws.

In 2010, the U.S. attempted to resolve the dispute by requesting consultations under chapter 16 (labor) of the CAFTA-DR. See *Digest 2010* at 492-94 for background and excerpts from the request for consultations. Consultations failed to resolve the dispute and, in May 2011, the U.S. requested that the Free Trade Commission meet to resolve the dispute. See Press Release announcing request for FTC meeting, available at www.ustr.gov/about-us/press-office/press-releases/2011/may/ustr-kirk-seeks-enforcement-labor-laws-guatemala.

The Free Trade Commission met in June and intense work ensued to attempt to reach an agreement on an adequate enforcement plan, but those efforts did not succeed. In announcing that the U.S. would be taking the next step in the dispute, Ambassador Kirk stated:

With this case, we are sending a strong message that the Obama Administration will act firmly to ensure effective enforcement of labor laws by our trading partners. While Guatemala has taken some positive steps, its overall actions and proposals to date have been insufficient to address the apparent systemic failures. We need to see concrete actions to protect the rights of workers as agreed under our trade agreement, and we are prepared to act to obtain enforcement of those rights when and where necessary.

The full text of the announcement is available at www.ustr.gov/about-us/press-office/press-releases/2011/august/us-trade-representative-ron-kirk-announces-next-ste.

c. Dispute Resolution: Submission of the U.S. in *Pac Rim v. El Salvador*

On May 20, 2011, in an arbitration brought under CAFTA-DR Chapter 10, the United States made a submission pursuant to Article 10.20.2 on a question of interpretation of CAFTA-DR in *Pac Rim Cayman LLC v. El Salvador* (ICSID Case No. ARB/09/12). Claimant Pac Rim Cayman LLC is a gold mining company that incorporated in the Cayman Islands. It became a Nevada company in a December 2007 corporate restructuring. In the Notice of Arbitration, filed on April 30, 2009, Claimant alleged that El Salvador violated obligations under CAFTA-DR Articles 10.3 (national treatment), 10.4 (most-favored-nation treatment), 10.5 (minimum standard of treatment) and 10.7 (expropriation). Claimant sought damages in excess of \$77 million in connection with measures, including environmental permits and exploitation concessions, allegedly adversely affecting Claimant's exploitation of gold resources in El Salvador. The U.S. submission on interpretation of the CAFTA-DR is excerpted below (with most footnotes omitted) and available in full at www.state.gov/documents/organization/164308.pdf.

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4. The United States hereby addresses two issues of treaty interpretation related to CAFTA-DR Article 10.12.2: first, whether a CAFTA-DR Party is required to invoke the denial of benefits provision under Article 10.12.2 before arbitration commences; and second, whether the notice provision under CAFTA-DR Article 18.3, which is referenced in Article 10.12.2, requires the Party to give notice to the claimant as well as to the Party under the law of which the claimant is constituted or organized.

A CAFTA-DR Party Is Not Required To Invoke The Denial Of Benefits Provision Under Article 10.12.2 Before Arbitration Commences

5. Article 10.12.2 imposes two substantive requirements that must be met before the provision can be invoked by a CAFTA-DR Party; specifically, an enterprise must (1) have no substantial business activities in the territory of any Party other than the denying Party, and (2) be owned or controlled by persons of a non-Party or of the denying Party. Article 10.12.2 does not impose any requirement, however, with respect to *when* a respondent may invoke the denial of benefits provision. Neither this Article nor any other provision of CAFTA-DR precludes a Party from invoking the denial of benefits provision at an appropriate time, including as part of a jurisdictional defense after a claim has been submitted to arbitration, to deny a claimant enterprise benefits under the Agreement.¹ There is no basis to read into the plain language of Article 10.12.2 a requirement that a Party assert its right to deny benefits before the commencement of arbitration.

6. Requiring the respondent to invoke the denial of benefits provision before a claim is filed would place an untenable burden on that Party. It would require the respondent, in effect,

¹ See CAFTA-DR, art. 10.12.2. Under Article 10.12.2, "a Party may deny the benefits of this Chapter." As such, a CAFTA-DR Party may invoke Article 10.12.2 to deny the benefits of both the substantive provisions and the dispute settlement provisions of Chapter Ten.

to monitor the ever-changing business activities of all enterprises in the territories of each of the other six CAFTA-DR Parties that attempt to make, are making, or have made investments in the territory of the respondent. This would include conducting, on a continuing basis, factual research, for all such enterprises, on their respective corporate structures and the extent of their business activities in those countries. To be effective, such monitoring would in many cases require foreign investors to provide business confidential and other types of non-public information for review. Requiring CAFTA-DR Parties to conduct this kind of continuous oversight in order to be able to invoke the denial of benefits provision under Article 10.12.2 before a claim is submitted to arbitration would undermine the purpose of the provision.

7. Similarly, there is no basis in the plain language of CAFTA-DR to suggest that a respondent is required to invoke Article 10.12.2 between the submission of a claimant's notice of intent and notice of arbitration. Article 10.16.2, for example, requires that a notice of intent include a claimant's "name and address," but Article 10.16.2 does not require a claimant to disclose the extent of the claimant's business activities in the territory of any CAFTA-DR Party or the names of any persons or entities that own or control the claimant enterprise.

8. For the above reasons, there is no reasonable basis under any applicable rule of treaty construction to read into the text of Article 10.12.2 a requirement to invoke the denial of benefits provision before arbitration commences.

Neither Article 10.12.2 nor Article 18.3 Requires Notice To Claimants

9. Under Article 10.12.2, a CAFTA-DR Party's denial of benefits is "subject to" Article 18.3, the provision that delineates notification requirements for CAFTA-DR Parties. Paragraph 1 of Article 18.3 provides:

To the maximum extent possible, each Party shall notify any other Party with an interest in the matter of any proposed or actual measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect that other Party's interests under this Agreement.

10. On its face, Article 18.3 requires a CAFTA-DR Party, to the maximum extent possible, to provide notice to one or more other CAFTA-DR Parties of certain "proposed or actual" measures as described in the provision. There is no mention of notice to claimants in Article 18.3, and none is required.

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3. Arbitration and Related Actions Arising from the Softwood Lumber Agreement

The United States has availed itself of the dispute resolution provisions under the 2006 Softwood Lumber Agreement ("SLA") in three separate proceedings. Documents related to these proceedings are available at www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/2006-softwood-lumber-agreement. One of these disputes was resolved by the 2009 award of a London Court of International Arbitration ("LCIA") tribunal. See *Digest 2009* at 442-44. The other disputes, which were ongoing in 2011, are discussed below. See *Digest 2006* at 762-63 for an overview of the SLA. The text of the SLA is available at www.state.gov/documents/organization/107266.pdf and amendments and annexes are available at www.state.gov/documents/organization/107267.pdf.

a. Award in arbitration on provincial subsidies: Case No. 81010

On January 20, 2011 a tribunal of the LCIA ("Tribunal") issued an award in favor of the United States, finding that Canada had violated the anti-circumvention provision of the SLA. *United States of America v. Canada*, LCIA, Case No. 81010. For prior developments in the arbitration, see *Digest 2009* at 444 and *Digest 2008* at 589-93. The Tribunal summarized its findings and award as follows:

- The Respondent **breached the anti-circumvention clause in Article XVII(1)** of the SLA by reason of the following programs or measures: (1) Ontario's Forest Sector Prosperity Fund; (2) Ontario's Forest Sector Loan Guarantee Program; (3) Québec's Forest Industry Support Program (PSIF); (4) Québec's Capital Tax Credit; and (5) Québec's Road Tax Credit (only in connection with the increase in tax credit from 40% to 90%);
- The Respondent shall have a period of 30 days from the notification of this Award to cure, through means of its own choosing, the breaches identified in the preceding paragraph;
- If the Respondent does not cure the breaches within the period identified in the preceding paragraph, the Compensatory Adjustments determined in paragraphs 410 - 411 above of this Award shall apply;
- Pursuant to Article XIV(21) of the SLA, the costs of these proceedings, which amount to US\$ 1,152,876.93, shall be paid from the funds allocated to the binational industry council for this purpose;
- Pursuant to Article XIV(21) of the SLA, each Party shall bear its own costs, including legal fees and other expenses;
- All other claims are dismissed.

Award, available at www.ustr.gov/webfm_send/2573. In its press release about the award, available at www.ustr.gov/about-us/press-office/press-releases/2011/january/united-states-wins-softwood-lumber-arbitration, USTR explained what would be required if Canada did not cure the breaches within the 30 day period:

Canada must impose, as an appropriate adjustment to compensate for the breach, additional charges on exports of softwood lumber to the United States originating in Quebec and Ontario. These additional export charges will remain in place for the duration of the SLA and it is anticipated that they will result in the collection of US \$59.4 million.

b. New U.S. request for arbitration on under-pricing of timber: Case No. 111790

On January 18, 2011, the United States requested arbitration at the LCIA, regarding the under-pricing of timber harvested from public lands in the Interior region of British Columbia. United States Trade Representative Ron Kirk explained:

Canada is providing an additional benefit to Canadian exporters of softwood lumber by selling timber harvested from public lands for prices below those provided for under the timber pricing system grandfathered under the SLA. By doing so, Canada is in breach of its commitments under the Agreement. This type of benefit harms U.S. workers and firms in the lumber industry, and is inconsistent with Canada's obligations under the 2006 Softwood Lumber Agreement. ...

USTR press release, available at www.ustr.gov/about-us/press-office/press-releases/2011/january/united-states-requests-arbitration-canada-under-so. The dispute involves the assignment of public timber to the salvage "grade 4," which British Columbia then sells to Canadian softwood lumber producers at the low fixed rate of 25 cents per cubic meter.

In 2010, the United States had requested formal consultations with Canada on the issue. See *Digest 2010* at 495. Consultations were held in 2010 but did not resolve the matter. After requesting arbitration in January, the United States submitted its Statement of Case on August 9, 2011. Excerpts follow (with footnotes and references to other submissions in the case omitted) from the Statement of Case, which is available in full in its non-confidential version at www.ustr.gov/webfm_send/3053.

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2. Since early 2007, Canada's largest softwood lumber exporting province has systematically underpriced timber harvested from Crown forests and sold it to Canadian lumber producers in breach of the 2006 Softwood Lumber Agreement ("SLA" or "Agreement"). In the SLA, Canada promised the United States one of two things regarding "stumpage" fees that British Columbia ("BC" or "the BC government") charges lumber producers for Crown timber: BC either would apply its newly-reformed timber pricing system to reflect its suitability for producing lumber, or if BC modified its system, it would do so in a way that maintained or improved the extent to which its stumpage fees reflect market conditions. BC did neither of these things. Instead, it ran in the opposite direction from market conditions by selling large volumes of lumber-quality timber for C\$0.25 per cubic meter, the fixed minimum price generally reserved for "reject" logs incapable of producing lumber. This was a breach of the SLA.

3. Over 90 percent of the forests in BC are owned by the provincial government. Under its timber pricing system, BC charges lumber companies a fee, known as "stumpage, for timber harvested from Crown forests. Stumpage fees are based on the timber's "grade"—an evaluation of the timber's suitability for manufacture into lumber. Before April 2006, the BC system had automatically graded *all* timber affected by the mountain pine beetle ("MPB timber") as lumber "reject" priced at the minimum stumpage fee, even though most beetle-affected timber can be used to produce merchantable lumber. This, of course, was a tremendous competitive advantage for Canadian lumber companies harvesting MPB timber for the manufacture of their lumber products.

4. While Canada and the United States were negotiating the SLA in 2006, BC agreed to reform its pricing system to address predicted increases in MPB timber. Under the reforms, BC would sell its timber at prices that reflect whether the timber could be used to make lumber, not

whether the timber was affected by the mountain pine beetle. The reforms recognized that the mountain pine beetle does not impair the quality of timber, which still can be used to produce lumber, and therefore recognized that BC should not sell all MPB timber for the minimum stumpage fee. BC anticipated that most MPB timber would be sold as lumber-quality. The calibrated new system, which also adjusted the timber price to reflect the effects of the mountain pine beetle, was a critical component of the SLA and of great importance to the United States, which had been concerned for years about BC's pricing system.

5. In April 2006, BC reformed its timber grading rules with the stated intent of pricing MPB timber in a way that reflects its suitability for use in making lumber. Shortly thereafter, Canada announced that the two governments had reached an agreement on the general terms of the SLA.

6. The SLA, effective as of October 2006, grandfathered the reforms made part of BC's timber pricing system. Although the SLA permitted BC to change the system, any changes had to maintain or improve the extent to which timber prices reflect market conditions for BC to avoid a breach.

7. But after reforming its system in 2006, BC quickly abandoned the new reforms beginning in early 2007, almost exactly when the North American housing and softwood lumber markets began to precipitously decline, driving the price of lumber down. BC resumed selling MPB timber for the minimum stumpage fee, to the enormous benefit of BC lumber producers and exporters; and in breach of the SLA.

8. Canada acknowledges that MPB timber can be used to manufacture merchantable lumber. The province's own commissioned studies of lumber recovery from MPB timber uniformly demonstrate this. More recently, Vancouver showcased MPB lumber during the 2010 Winter Olympic Games by constructing its speedskating venue using one million board feet of lumber made primarily from MPB timber. Yet soon after BC enacted its reformed system, and just months after the two governments entered into the SLA, BC restored the windfall that it previously had given BC lumber producers and exporters for MPB timber under the pre-April 2006 system. When those producers and exporters then sell lumber made from the cheaply-purchased timber, they recover substantially more money than they could have had they purchased the timber under the reforms grandfathered by the SLA. By its actions, BC has provided its lumber industry benefits approaching C\$500 million. Because these benefits breach the SLA, the United States has brought this arbitration proceeding to require Canada to remedy its breach.

I. Relevant Provisions Of The SLA

A. The United States Negotiated For A System Of Export Measures

9. The SLA entered into force on October 12, 2006, and resolved the decades-long series of disputes over Canadian softwood lumber exports into the United States. As part of the SLA, the United States agreed to cease collection of antidumping and countervailing duties imposed under its domestic laws and to refund US\$5 billion in deposits of duties that it had collected on Canadian softwood lumber entering the United States since May 2002.

10. In exchange, Canada agreed to apply Export Measures—export charges and volume limitations—to shipments of softwood lumber from Canada into the United States when the price of lumber products falls below a certain level. The price of lumber products has remained low since the inception of the Agreement in October 2006, and thus the Export Measures have been in effect almost every month in which the SLA has been in force.

11. The Agreement gave Canada's different lumber producing regions, including BC Interior, a choice regarding the types of Export Measures to which they would be subject. Regions selecting Option A chose to pay only an export charge and would not be subjected to a volume restraint. Regions electing Option B chose to pay a smaller export charge in combination with a volume restraint. BC Interior chose Option A, meaning that it has never been subject to a volume restraint. Rather, BC Interior may export as much softwood lumber to the United States as it wishes, so long as it pays the required export charges.

12. The Export Measures are a critical part of the benefit for which the United States bargained in the SLA. The United States agreed not to exercise its right to apply most of its own domestic trade remedy laws in return for Canada's agreement to self-regulate the production and export of softwood lumber, within the agreed-upon parameters. The Parties agreed to exchange certain information to ensure that the Agreement functions as intended. As part of that exchange, Canada is required to provide the United States information regarding exports of lumber to the United States, so that the parties can reconcile Canada's export information with the United States' import information. Canada is also required to notify the United States of any change to provincial timber pricing systems, together with an explanation, including any evidence showing how the change improves the statistical accuracy and reliability of the system, or how the change maintains or improves the extent to which the prices reflect market conditions.

B. Canada Agreed Not To Offset Or Circumvent The Export Measures

13. Canada further agreed not to offset or circumvent the Export Measures. This commitment is memorialized in Article XVII of the SLA and applies to Canada and all of its provinces, including BC.

14. The Anti-circumvention article prohibits a party from taking any "action to circumvent or offset the commitments under the SLA 2006, including any action having the effect of reducing or offsetting the Export Measures or undermining the commitments set forth in Article V." "Grants or other benefits" that Canadian federal, provincial, or local governments provide *de jure* or *de facto* to softwood lumber producers are deemed to circumvent the Export Measures, unless they fall within certain limited exceptions. In other words, benefits that are provided on a *de jure* or *de facto* basis *per se* circumvent the Agreement, unless an exception applies.

15. The SLA's Anti-circumvention article contains two pertinent exceptions to the general prohibition on grants or other benefits provided to producers or exporters of Canadian softwood lumber. First, the SLA provides that "measures that shall not be considered to reduce or offset the Export Measures in the SLA 2006 include without limitation":

{P}rovincial timber pricing or forest management systems as they existed on July 1, 2006, including any modifications or updates that maintain or improve the extent to which stumpage charges reflect market conditions, including prices and costs.

This is a grandfathering provision that permits Canada and its provinces to continue to apply provincial timber pricing or forest management systems or, if Canada wishes to change the system, requires that Canada maintain or improve the extent to which stumpage fees generated under these systems reflect market conditions.

16. Second, the Agreement provides that "measures that shall not be considered to reduce or offset the Export Measures" in the SLA include:

{A}ctions or programs undertaken by a Party ... for the purpose of forest or environmental management, protection, or conservation ... provided that such actions or

programs do not involve grants or other benefits that have the effect of undermining or counteracting movement toward the market pricing of timber[.]

17. Read together, the Anti-circumvention provisions contemplate that any grant or other benefit provided by BC (or any Canadian province or governmental entity) circumvents the SLA if the grant or other benefit is provided to producers or exporters of Canadian softwood lumber. There are limited exceptions to this rule, but, in general, these exceptions do not permit any grants or other benefits that are inconsistent with a movement toward the market pricing of timber, or, minimally, with maintaining the status quo.

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4. Free Trade Agreements

a. Implementation: United States-Peru Trade Promotion Agreement ("PTPA")

In 2011, both the United States and Peru took steps to implement the PTPA. On October 28, 2011, the United States Treasury and Homeland Security Departments amended the Customs and Border Protection ("CBP") regulations on an interim basis to implement the preferential tariff treatment and other customs-related provisions of the PTPA. 76 Fed. Reg. 68,067-84 (Nov. 3, 2011).

On June 15, 2011, Peru's Congress passed a new forestry and wildlife law which included key reforms called for under the PTPA Annex on Forest Sector Governance to combat illegal logging and illegal trade in wildlife. The Government of Peru conducted extensive consultations with indigenous and local communities and other stakeholders in Peru in the lead-up to passage of the forestry and wildlife law. United States Trade Representative Ron Kirk welcomed the new law and other steps taken by Peru to implement the environmental obligations under the PTPA:

The United States has worked closely with Peru over a period of two years while it developed legal provisions to strengthen forest sector governance as called for under the PTPA Annex on Forest Sector Governance. In addition to passage of the Forestry and Wildlife Law, the Government of Peru has made other unprecedented changes to its legal and regulatory regimes to implement its commitments under the Annex, including amending its Criminal Code to increase penalties for forest, wildlife and environmental crimes and assigning ecological police officers and prosecutors to regions in Peru. It also created a Ministry of Environment to take the lead on natural protected areas and to assume other important environmental duties.

Statement by Ambassador Kirk, available at www.ustr.gov/about-us/press-office/press-releases/2011/june/statement-ambassador-ron-kirk-passage-perus-forestry. The PTPA is the first U.S. trade agreement to include provisions requiring action to address a specific environmental concern and the first such agreement to subject all the environmental obligations to the same state-to-state dispute settlement procedures as commercial obligations in the agreement. See *Digest 2009* at 432-33 for discussion of the entry into force of the PTPA.

b. Free trade agreements with Panama, Colombia, and Korea

On October 21, 2011, President Obama signed legislation implementing the Panama, Colombia, and Korea free trade agreements. Pub. L. Nos. 112-43, 112-42, and 112-41. The text of the Panama trade promotion agreement (“TPA”) is available at www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text. More information about the Panama TPA is available at www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa. The final text of the Columbia FTA is available at www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text. Further information about the U.S.-Columbia agreement is available at www.ustr.gov/uscolombiatpa. The final text of the U.S.-Korea Free Trade Agreement (“KORUS FTA”) is available at www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text. Information about the KORUS FTA is available at www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta.

USTR released a fact sheet on October 13, 2011, excerpted below, describing the next steps for these trade agreements leading up to their entry into force. The fact sheet is available at www.ustr.gov/about-us/press-office/fact-sheets/2011/october/enactment-entry-force-next-steps-trade-agreements. As of the end of 2011, United States government officials were still working with representatives of the governments of Panama, Colombia, and Korea on steps necessary for entry into force of the agreements.

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The length of time necessary to implement trade agreements varies, but the President is committed to bringing these agreements into force as soon as possible to reap their benefits at home. Here are next steps:

Action by our Trading Partners

Korea’s National Assembly is now considering the U.S.-Korea trade agreement.* The legislatures of Colombia and Panama have ratified their respective agreements.

Beyond ratification, what each partner country must do to come into compliance with the agreement depends on its specific laws and regulations. Before the agreement can enter into force, each country must be able to demonstrate that it is in compliance with those obligations that will take effect on day one.

Action Here at Home

The trade agreement implementing bills contain all changes to U.S. law necessary to bring the United States into compliance with the agreements. In addition to these changes in U.S. law, for each agreement the United States will issue a proclamation containing specific tariff revisions and product-specific rules, and make additional administrative and regulatory changes covering issues such as customs and procurement.

Cooperative Work with our Trading Partners

* Editor’s note: Korea’s National Assembly subsequently approved the agreement in November 2011.

Immediately after President Obama signs the implementing legislation, the United States will schedule cooperative work with Korea, Colombia, and Panama on implementing the agreements. The United States will hold discussions with the partner countries to review both countries' laws and regulations, and ensure compliance with the obligations of the agreement that will take effect on the day the agreement enters into force. U.S. officials will also consult with Congress and with U.S. stakeholders.

Exchange of Diplomatic Notes

The provisions of the FTAs provide for entry into force through the exchange of formal diplomatic notes at a time agreeable to both countries. In the United States, the President must first determine that the trading partner has come into compliance with obligations that will take effect when the agreement enters into force. This includes, in the case of Korea, the pertinent obligations of the 2011 exchange of letters on autos. In the case of Colombia, the Administration will also ensure that Colombia has successfully implemented key elements of the Labor Action Plan before bringing that agreement into force.

Implementation, Monitoring, and Enforcement

Following the entry into force of each agreement, work continues at the Office of the U.S. Trade Representative to ensure that each partner country remains in compliance with its immediate obligations, and comes into compliance with obligations that take effect later on. As with all U.S. trade agreements, USTR will monitor compliance and actively enforce U.S. rights under these three trade agreements going forward.

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c. Trans-Pacific Partnership

On November 12, 2011, the leaders of the nine Trans-Pacific Partnership ("TPP") countries—Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam, and the United States—announced that they had agreed on the outlines of a trade and investment agreement. A USTR Fact Sheet, excerpted below and available at www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement, outlined the agreement's key features, scope, and legal texts.

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Key Features

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- Comprehensive market access: to eliminate tariffs and other barriers to goods and services trade and investment, so as to create new opportunities for our workers and businesses and immediate benefits for our consumers.
- Fully regional agreement: to facilitate the development of production and supply chains among TPP members, supporting our goal of creating jobs, raising living standards, improving welfare and promoting sustainable growth in our countries.

- Cross-cutting trade issues: to build on work being done in APEC and other fora by incorporating in TPP four new, cross-cutting issues. These are:
 - Regulatory coherence. Commitments will promote trade between the countries by making trade among them more seamless and efficient.
 - Competitiveness and Business Facilitation. Commitments will enhance the domestic and regional competitiveness of each TPP country's economy and promote economic integration and jobs in the region, including through the development of regional production and supply chains.
 - Small- and Medium-Sized Enterprises. Commitments will address concerns small- and medium-sized enterprises have raised about the difficulty in understanding and using trade agreements, encouraging small- and medium-sized enterprises to trade internationally.
 - Development. Comprehensive and robust market liberalization, improvements in trade and investment enhancing disciplines, and other commitments, including a mechanism to help all TPP countries to effectively implement the Agreement and fully realize its benefits, will serve to strengthen institutions important for economic development and governance and thereby contribute significantly to advancing TPP countries' respective economic development priorities.
- New trade challenges: to promote trade and investment in innovative products and services, including related to the digital economy and green technologies, and to ensure a competitive business environment across the TPP region.
- Living agreement: to enable the updating of the agreement as appropriate to address trade issues that emerge in the future as well as new issues that arise with the expansion of the agreement to include new countries.

Scope

- The agreement is being negotiated as a single undertaking that covers all key trade and trade-related areas. In addition to updating traditional approaches to issues covered by previous free trade agreements (FTAs), the TPP includes new and emerging trade issues and cross-cutting issues.
- More than twenty negotiating groups have met over nine rounds to develop the legal texts of the agreement and the specific market access commitments the TPP countries will make to open their markets to each others' goods, services, and government procurement.
- All of the nine countries also have agreed to adopt high standards in order to ensure that the benefits and obligations of the agreement are fully shared. They also have agreed on the need to appropriately address sensitivities and the unique challenges faced by developing country members, including through trade capacity building, technical assistance, and staging of commitments as appropriate.
- A set of new, cross-cutting commitments are intended to reduce costs, enable the development of a more seamless trade flows and trade networks between TPP members, encourage the participation of small- and medium-sized enterprises in international trade, and promote economic growth and higher living standards.
- The negotiating teams have proposed new commitments on cross-cutting issues in traditional chapters and also have made substantial progress toward agreement on separate, stand-alone commitments to address these issues.

Legal Texts

- The negotiating groups have developed consolidated legal text in virtually all negotiating groups. In some areas, text is almost complete; in others, further work is needed to finalize text on specific issues. The texts contain brackets to indicate where differences remain.

- The legal texts will cover all aspects of commercial relations among the TPP countries. The following are the issues under negotiation and a summary of progress.

- **Competition.** The competition text will promote a competitive business environment, protect consumers, and ensure a level playing field for TPP companies. Negotiators have made significant progress on the text, which includes commitments on the establishment and maintenance of competition laws and authorities, procedural fairness in competition law enforcement, transparency, consumer protection, private rights of action and technical cooperation.
- **Cooperation and Capacity Building.** The TPP countries agree that capacity building and other forms of cooperation are critical both during the negotiations and post-conclusion to support TPP countries' ability to implement and take advantage of the agreement. They recognize that capacity building activities can be an effective tool in helping to address specific needs of developing countries in meeting the high standards the TPP countries have agreed to seek. In this spirit, several cooperation and capacity building activities have already been implemented in response to specific requests and additional activities are being planned to assist developing countries in achieving the objectives of the agreement. The TPP countries also are discussing specific text that will establish a demand-driven and flexible institutional mechanism to effectively facilitate cooperation and capacity building assistance after the TPP is implemented.
- **Cross-Border Services.** TPP countries have agreed on most of the core elements of the cross-border services text. This consensus provides the basis for securing fair, open, and transparent markets for services trade, including services supplied electronically and by small- and medium-sized enterprises, while preserving the right of governments to regulate in the public interest.
- **Customs.** TPP negotiators have reached agreement on key elements of the customs text as well as on the fundamental importance of establishing customs procedures that are predictable, transparent and that expedite and facilitate trade, which will help link TPP firms into regional production and supply chains. The text will ensure that goods are released from customs control as quickly as possible, while preserving the ability of customs authorities to strictly enforce customs laws and regulations. TPP countries also have agreed on the importance of close cooperation between authorities to ensure the effective implementation and operation of the agreement as well as other customs matters.
- **E-Commerce.** The e-commerce text will enhance the viability of the digital economy by ensuring that impediments to both consumer and businesses embracing this medium of trade are addressed. Negotiators have made encouraging progress, including on provisions addressing customs duties in the digital environment, authentication of electronic transactions, and consumer protection. Additional proposals on information flows and treatment of digital products are under discussion.
- **Environment.** A meaningful outcome on environment will ensure that the agreement appropriately addresses important trade and environment challenges and enhances the mutual supportiveness of trade and environment. The TPP countries share the view

- that the environment text should include effective provisions on trade-related issues that would help to reinforce environmental protection and are discussing an effective institutional arrangement to oversee implementation and a specific cooperation framework for addressing capacity building needs. They also are discussing proposals on new issues, such as marine fisheries and other conservation issues, biodiversity, invasive alien species, climate change, and environmental goods and services.
- Financial Services. The text related to investment in financial institutions and cross-border trade in financial services will improve transparency, non-discrimination, fair treatment of new financial services, and investment protections and an effective dispute settlement remedy for those protections. These commitments will create market-opening opportunities, benefit businesses and consumers of financial products, and at the same time protect the right of financial regulators to take action to ensure the integrity and stability of financial markets, including in the event of a financial crisis.
 - Government Procurement. The text of the Government Procurement Chapter will ensure that procurement covered under the chapter is conducted in a fair, transparent, and non-discriminatory manner. The TPP negotiators have agreed on the basic principles and procedures for conducting procurement under the chapter, and are developing the specific obligations. The TPP partners are seeking comparable coverage of procurement by all the countries, while recognizing the need to facilitate the opening of the procurement markets of developing countries through the use of transitional measures.
 - Intellectual Property. TPP countries have agreed to reinforce and develop existing World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) rights and obligations to ensure an effective and balanced approach to intellectual property rights among the TPP countries. Proposals are under discussion on many forms of intellectual property, including trademarks, geographical indications, copyright and related rights, patents, trade secrets, data required for the approval of certain regulated products, as well as intellectual property enforcement and genetic resources and traditional knowledge. TPP countries have agreed to reflect in the text a shared commitment to the Doha Declaration on TRIPS and Public Health.
 - Investment. The investment text will provide substantive legal protections for investors and investments of each TPP country in the other TPP countries, including ongoing negotiations on provisions to ensure non-discrimination, a minimum standard of treatment, rules on expropriation, and prohibitions on specified performance requirements that distort trade and investment. The investment text will include provisions for expeditious, fair, and transparent investor-State dispute settlement subject to appropriate safeguards, with discussions continuing on scope and coverage. The investment text will protect the rights of the TPP countries to regulate in the public interest.
 - Labor. TPP countries are discussing elements for a labor chapter that include commitments on labor rights protection and mechanisms to ensure cooperation, coordination, and dialogue on labor issues of mutual concern. They agree on the importance of coordination to address the challenges of the 21st-century workforce through bilateral and regional cooperation on workplace practices to enhance

workers' well-being and employability, and to promote human capital development and high-performance workplaces.

- Legal Issues. TPP countries have made substantial progress on provisions concerning the administration of the agreement, including clear and effective rules for resolving disputes and are discussing some of the specific issues relating to the process. TPP countries also have made progress on exceptions from agreement obligations and on disciplines addressing transparency in the development of laws, regulations, and other rules. In addition, they are discussing proposals related to good governance and to procedural fairness issues in specific areas.
- Market Access for Goods. The TPP countries have agreed to establish principles and obligations related to trade in goods for all TPP countries that ensure that the market access that they provide to each other is ambitious, balanced, and transparent. The text on trade in goods addresses tariff elimination among the partners, including significant commitments beyond the partners' current WTO obligations, as well as elimination of non-tariff measures that can serve as trade barriers. The TPP partners are considering proposals related to import and export licensing and remanufactured goods. Additional provisions related to agricultural export competition and food security also are under discussion.
- Rules of Origin. TPP countries have agreed to seek a common set of rules of origin to determine whether a product originates in the TPP region. They also have agreed that TPP rules of origin will be objective, transparent and predictable and are discussing approaches regarding the ability to cumulate or use materials from within the free trade area in order to make a claim that a product is originating. In addition, the TPP countries are discussing the proposals for a system for verification of preference claims that is simple, efficient and effective.
- Sanitary and Phytosanitary Standards (SPS). To enhance animal and plant health and food safety and facilitate trade among the TPP countries, the nine countries have agreed to reinforce and build upon existing rights and obligations under the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures. The SPS text will contain a series of new commitments on science, transparency, regionalization, cooperation, and equivalence. In addition, negotiators have agreed to consider a series of new bilateral and multilateral cooperative proposals, including import checks and verification.
- Technical Barriers to Trade (TBT). The TBT text will reinforce and build upon existing rights and obligations under the World Trade Organization Agreement on Technical Barriers, which will facilitate trade among the TPP countries and help our regulators protect health, safety, and the environment and achieve other legitimate policy objectives. The text will include commitments on compliance periods, conformity assessment procedures, international standards, institutional mechanisms, and transparency. The TPP countries also are discussing disciplines on conformity assessment procedures, regulatory cooperation, trade facilitation, transparency, and other issues, as well as proposals that have been tabled covering specific sectors.
- Telecommunications. The telecommunications text will promote competitive access for telecommunications providers in TPP markets, which will benefit consumers and help businesses in TPP markets become more competitive. In addition to broad agreement on the need for reasonable network access for suppliers through

- interconnection and access to physical facilities, TPP countries are close to consensus on a broad range of provisions enhancing the transparency of the regulatory process, and ensuring rights of appeal of decisions. Additional proposals have been put forward on choice of technology and addressing the high cost of international mobile roaming.
- Temporary Entry. TPP countries have substantially concluded the general provisions of the chapter, which are designed to promote transparency and efficiency in the processing of applications for temporary entry, and ongoing technical cooperation between TPP authorities. Specific obligations related to individual categories of business person are under discussion.
 - Textiles and Apparel. In addition to market access on textiles and apparel, the TPP countries also are discussing a series of related disciplines, such as customs cooperation and enforcement procedures, rules of origin and a special safeguard.
 - Trade Remedies. TPP countries have agreed to affirm their WTO rights and obligations and are considering new proposals, including obligations that would build upon these existing rights and obligations in the areas of transparency and procedural due process. Proposals also have been put forward relating to a transitional regional safeguard mechanism.

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President Obama delivered remarks at the meeting of the leaders of the nine TPP countries in Hawaii on November 12, 2011. His remarks are excerpted below. Daily Comp. Pres. Docs. 2011 DCPD No. 00854, p. 1.

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I want to welcome, once again, all the leaders gathered around this table and their trade ministers to Hawaii. Here in Hawaii, the United States wants to send a clear message: We are a Pacific nation, and we are deeply committed to shaping the future security and prosperity of the Trans-Pacific region, the fastest growing region in the world.

I'm very pleased to be here with my partners with whom we're pursuing a very ambitious new trade agreement, the Trans-Pacific Partnership. I want to thank my fellow leaders from Australia, New Zealand, Malaysia, Brunei, Singapore, Vietnam, Chile, and Peru.

We just had an excellent meeting, and I'm very pleased to announce that our nine nations have reached the broad outlines of an agreement. There are still plenty of details to work out, but we are confident that we can do so. So we've directed our teams to finalize this agreement in the coming year. It is an ambitious goal, but we are optimistic that we can get it done.

The TPP will boost our economies, lowering barriers to trade and investment, increasing exports, and creating more jobs for our people, which is my number-one priority. Along with our trade agreements with South Korea, Panama, and Colombia, the TPP will also help achieve my goal of doubling U.S. exports, which support millions of American jobs.

Taken together, these eight economies would be America's fifth largest trading partner. We already do more than \$200 billion in trade with them every single year, and with nearly 500 million consumers between us, there's so much more that we can do together.

In a larger sense, the TPP has the potential to be a model not only for the Asia-Pacific, but for future trade agreements. It addresses a whole range of issues not covered by past agreements, including market regulations and how we can make them more compatible, creating opportunities for small and medium-sized businesses in the growing global marketplace. It will include high standards to protect workers' rights and the environment.

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5. Bilateral Investment Treaty with Rwanda

On September 26, 2011, the U.S. Senate approved the U.S.-Rwanda Bilateral Investment Treaty ("BIT") by unanimous consent. 157 Cong. Rec. S6004 (2011). The State Department's September 27, 2011 media note applauding the Senate's approval of the treaty is available at www.state.gov/r/pa/prs/ps/2011/09/174101.htm. On December 2, 2011, the two sides exchanged instruments of ratification. The BIT entered into force 30 days later, on January 1, 2012. The text of the BIT and its annexes is available at www.ustr.gov/trade-agreements/bilateral-investment-treaties/bit-documents. See *Digest 2008* for background on the signing of the U.S.-Rwanda BIT and excerpts from the transmittal package submitted to the Senate for advice and consent.

E. ANTITRUST

On March 31, 2011, the United States Department of Justice and the United States Federal Trade Commission entered into an agreement on antitrust cooperation with the Fiscalía Nacional Económica ("FNE") of Chile. Cooperating in the area of competition policy was one of the commitments made under the U.S.-Chile Free Trade Agreement, signed in 2003. The antitrust agreement is available at www.justice.gov/atr/public/international/docs/269195.htm.

On July 27, 2011, the United States Department of Justice and the United States Federal Trade Commission entered into a Memorandum of Understanding on Antitrust and Antimonopoly Cooperation with relevant agencies in the government of the People's Republic of China. The MOU is available at www.ftc.gov/os/2011/07/110726mou-english.pdf.

F. OTHER ISSUES

1. Intellectual Property: Special 301 Report

On May 2, 2011, the Office of the U.S. Trade Representative ("USTR") announced the issuance of the 2010 Special 301 Report ("Report") to identify those foreign countries that deny adequate and effective protection of intellectual property rights ("IPR") or deny fair and equitable market access to U.S. persons that rely upon intellectual property protection. USTR submits the Report annually pursuant to § 182 of the Trade Act of 1974, as amended

by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994). The 2011 Report reviewed 77 trading partners' protection and enforcement of IPR and identified 12 countries on the Priority Watch List, 29 on the Watch List, and one country under § 306 monitoring. Countries listed in these categories are found lacking with respect to IPR protection, enforcement, or market access for persons relying on intellectual property protection. See *Digest 2007* at 605–7 for additional background.

The 2011 Report included an invitation to all trading partners listed in the Report to cooperatively develop action plans to resolve IPR issues of concern. In the past, successful completion of action plans has led to trading partners' removal from the Special 301 lists. The Report identified particular problems in the listed countries, such as: Canada's failure in 2010 to enact long-awaited copyright legislation and to strengthen border enforcement; the prevalence of piracy and counterfeiting in China, and China's implementation of "indigenous innovation" and other industrial policies that discriminate against or otherwise disadvantage U.S. exports and U.S. investors; ongoing problems involving piracy over the internet, and a need for better enforcement of IPR laws in Russia. The Report also recognized positive accomplishments in a number of areas. These accomplishments included the enactment of significant IPR legislation in Mexico, the Philippines, Russia, and Spain. However, no countries were removed from the watch lists. The full text of the Report is available at www.ustr.gov/webfm_send/2841. For a list of the countries identified in the 2011 Report, see USTR's press release of May 2, 2011, available at www.ustr.gov/about-us/press-office/press-releases/2011/may/ustr-releases-annual-special-301-report-intellectual-p.

Separately, on February 28, 2011 USTR issued the conclusions of a Special 301 Out-of-Cycle Review of Notorious Markets, available at www.ustr.gov/webfm_send/2595. The notorious market list had previously been included in the annual Special 301 Report. However, USTR concluded that it could further expose the notorious markets list by initiating a separate, dedicated request for comments, and by publishing the list separately from the Special 301 Report. The results of the review identified concerns with more than 30 Internet and physical markets that present key challenges in the struggle against piracy and counterfeiting. For further information on the Notorious Markets list, see USTR's press release of February 28, 2011 available at www.ustr.gov/about-us/press-office/press-releases/2011/february/ustr-announces-results-special-301-review-notorio.

2. OECD Guidelines for Multinational Enterprises: Due Diligence Regarding Conflict Minerals

On May 25, 2011 the Organization for Economic Cooperation and Development ("OECD") adopted new updates to the Guidelines for Multinational Enterprises. Representatives of OECD members, including Secretary of State Hillary Rodham Clinton, adopted the updated guidelines during the OECD's 50th Anniversary Commemoration. Secretary Clinton described the significance of the guidelines as a whole and the updates related to corporate social responsibility in a speech, set forth below and available at www.state.gov/secretary/rm/2011/05/164340.htm. See *Digest 2002* for a discussion of U.S. adherence to the OECD guidelines—in particular by establishing a national contact

point. The guidelines are non-binding recommendations for appropriate corporate behavior made to multinational enterprises by OECD members and non-member countries. The updated guidelines are available at www.state.gov/documents/organization/140824.pdf.

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Next, we turn to the OECD New Guidelines for Multinational Enterprises. For over 35 years, these guidelines have occupied a unique space within the world of corporate social responsibility. They are the only ones formally endorsed by governments, 42 at last count. And they do bring together labor, civil society, and business to create the broadest possible consensus behind them. This is truly the work of a global policy network in action.

This year's updated guidelines include an important new chapter on human rights, drawing on the work of UN Special Representative John Ruggie. These guidelines help companies ensure their dealings with third parties do not cause or contribute to human rights violations.

And let me now invite those who will be formalizing this very important step forward, because after all, if you look at these guidelines, they will be helping us determine how supply chains can be changed so that it can begin to prevent and eliminate abuses and violence. We're going to look at new strategies that will seek to make our case to companies that due diligence, while not always easy, [is] absolutely essential. ...

And I was particularly pleased to see a recommendation that businesses act as partners in promoting a free and open internet. We've seen the results of what happens when we see repression being exercised on the internet, so this is a very big step forward.

The countries adhering to the Declaration on International Investment and Multinational Enterprises are all OECD members, plus Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania, adopting the amended Guidelines for Multinational Enterprises.

The OECD Council now adopts the amended decision on the OECD Guidelines for Multinational Enterprises. And here I note that Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania adhere to this decision.

Next, moving to the adoption of the Recommendation on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, the OECD Council adopts the recommendation, and I note that Argentina, Brazil, Latvia, Lithuania, Morocco, Peru, and Romania adhere to this recommendation. And Brazil has made a statement which will be included in the summary record and in the final text of the recommendation.

Each of these agreements reflects a great deal of consensus-building and hard work, and I think we should be especially grateful to those who are standing here on the stage. I think we all look forward to working closely with you and others committed to raising standards for corporate social responsibility, just as we have done today.

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On July 15, 2011, the State Department issued a statement specifically endorsing and encouraging companies to follow the new “OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.” The statement is available at www.state.gov/e/eb/diamonds/docs/168632.htm. The statement explained that promoting acceptance of the OECD guidance runs parallel with requirements under Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). Section 1502 directs the Securities and Exchange Commission (“SEC”), in consultation with the State Department, to promulgate regulations requiring companies reporting to the SEC to disclose each year whether conflict minerals (gold, columbite-tantalite (coltan), cassiterite (tin), wolframite (tungsten)), used in any of their products originated in the Democratic Republic of the Congo (DRC) or an adjoining country, and if so, to disclose the measures taken to exercise due diligence on the source and chain of custody of the minerals. Excerpts of the statement, signed by Under Secretary of State for Economic, Energy, and Agricultural Affairs, Robert D. Hormats and Under Secretary of State for Democracy and Global Affairs, María Otero, follow.

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The Department holds that it is critical that companies begin now to perform meaningful due diligence with respect to conflict minerals. To this end, companies should begin immediately to structure their supply chain relationships in a responsible and productive manner to encourage legitimate, conflict-free trade. Doing so will facilitate useful disclosures under Section 1502, as well as effective responses to any discovery of benefit to armed groups.

The Department specifically endorses the guidance issued by the Organization for Economic Cooperation and Development (OECD) and encourages companies to draw upon this guidance as they establish their due diligence practices.¹ We encourage companies, whether or not they are subject to the Section 1502 disclosure requirement, that are within the supply chain of these minerals to exercise due diligence based on the OECD guidance and framework as a means of responding to requests from subject suppliers and customers.

The five-step framework at the core of this system has been developed in a broadly consultative, multi-stakeholder process and has been recommended by the United Nations Security Council DRC Sanctions Committee’s Group of Experts (UNGOE), “taken forward” by the Security Council itself, and endorsed by the International Conference on the Great Lakes Region. Under this five-step framework, companies should:

1. Establish strong company management systems;
2. Identify and assess risk in the supply chain;
3. Design and implement a strategy to respond to identified risks;
4. Carry out independent third-party audit of supply chain due diligence at identified points in the supply chain; and

¹ “OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas,” adopted as a Recommendation by the OECD Council on May 25, 2011, under the chairmanship of Secretary of State Hillary Clinton and available at www.oecd.org/dataoecd/62/30/46740847.pdf.

5. Report on supply chain due diligence.

This framework has particular significance in light of its development by an inclusive and international multi-stakeholder process, its regional endorsement by the International Conference of the Great Lakes Region, and the decision of the UN Security Council to consider, when it is determining whether to designate for targeted sanctions an individual or entity supporting the armed groups that foster conflict and human rights abuses in the eastern part of the DRC through illicit trade of natural resources, whether an individual or entity has exercised due diligence consistent with these steps. Consistent with the five-step framework, a company may rely on the documented representations of suppliers further “upstream,” provided that the company has taken the appropriate internal and independent auditing measures and due diligence steps set forth in the five-step framework. Furthermore, we note that, according to the OECD guidance, companies “may coordinate efforts through industry-wide initiatives to...overcome practical challenges and effectively discharge the due diligence recommendations contained in this Guidance.”

We recognize implementation of this framework will take time, and will present challenges as many of the mechanisms needed to facilitate transparency for in-region sourcing are developed. We also acknowledge that these due diligence frameworks will likely continue to evolve and develop, particularly as both the OECD and UNGOE are engaged in processes to evaluate implementation. Nonetheless, we urge governments to take steps to support these frameworks and companies to begin to exercise due diligence immediately in order to ensure a viable and conflict-free supply chain of minerals from the region. To facilitate this process, we will continue to hold consultations on the way forward with interested stakeholders in order to produce collective answers to the many outstanding issues.

Finally, the Department wishes to make clear that the intention of this guidance is to facilitate and promote improved governance, peace and stability, respect for human rights, economic development, and improved livelihoods in the DRC and Great Lakes region. We thank the private sector for its partnership in implementing this critical tool to end the trade in conflict minerals, and we thank civil society for its partnership in supporting greater peace and prosperity in the DRC.

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Cross References

Counternarcotics majors list, **Chapter 3.B.2.a.**

Anti-Counterfeiting Trade Agreement, **Chapter 4.A.2.**

Statute implementing Berne (Copyright) Convention (Golan v. Holder), **Chapter 4.B.2.**

Alien Tort Claims Act and Torture Victim Protection Act, **Chapter 5.B.**

Act of State and Political Question doctrines, **Chapter 5.C.**

Guiding principles on business and human rights, **Chapter 6.A.3.c.**

Work of the ILC on “fair and equitable treatment” standard, **Chapter 7.C.**

Immunity from attachment of multinational research satellite, **Chapter 10.A.2.a.(1)**

Commercial private international law, **Chapter 15.A.**

International civil litigation in U.S. courts, **Chapter 15.B.**

Sanctions, **Chapter 16.**